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# “WAS THE FIRST JUSTICE HARLAN ANTI-CHINESE?”

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## “WAS THE FIRST JUSTICE HARLAN ANTI-CHINESE?”

JAMES W. GORDON\*

“My whole nature responds to the principle of equality of all men before the law, as well as to the principle of the equal protection by the laws for everyone in his personal and property rights.” – John Marshall Harlan<sup>1</sup>

[T]o be labeled a prophet is to be held to an impossible standard. In many ways, Harlan’s views fell short of our current notions of racial equality. But Harlan was not a philosopher; he was a judge. His job was not to divine eternal truths, but to make socially situated legal judgments. It is correct to say that Harlan’s views on race were as problematic in some ways as they were progressive in others. But in reaching that conclusion, we benefit from a century’s worth of hindsight and experience that Harlan did not have.<sup>2</sup>

### INTRODUCTION

The first Justice John Marshall Harlan died on October 14, 1911. After years of practicing law, extended participation in politics, and almost thirty-four years of service on the Supreme Court of the United States, he left almost nothing of economic value to his family. Harlan’s only legacy was his reputation.<sup>3</sup>

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1. Letter from John Marshall Harlan to Augustus E. Willson (n.d. 1895), *microformed on* JOHN MARSHALL HARLAN PAPERS, UNIVERSITY OF LOUISVILLE, reel 11, frame 1248 (Univ. of Louisville) [hereinafter HARLAN PAPERS, UL]. Harlan and Willson were close friends and Harlan was unusually candid in his letters to Willson, his former law partner.

2. Goodwin Liu, *The First Justice Harlan*, 96 CALIF. L. REV. 1383, 1392 (2008).

3. For the factual details of Harlan’s life, see TINSLEY E. YARBROUGH, *JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN* (1995) and LOREN P. BETH, *JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE* (1992). See also Louis Hartz, *John M. Harlan in Kentucky, 1855-1877: The Story of His Pre-Court Career*, 14 FILSON CLUB HIST. Q. 17 (1940); Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637 (1957).

One might well ask: What did Harlan make of his own lack of financial success? In a moment of self-revelation, Harlan once observed “the large majority of statesmen . . . [have] died poor . . . . [A man goes into public life from the ambition that he will] live after he is dead

During the years Harlan served on the supreme bench, from 1877 to 1911, the Court and the country dealt continually with questions involving race. Both the Court and the country struggled to understand the consequences of the Civil War, to give meaning to the constitutional amendments it produced, and to replace slavery with a different paradigm for race relations. Besides the old problems of Black and White, the Court faced additional new ones as the United States completed its destruction of Native American independence and culture, and struggled with immigration policy and popular hostility toward the Chinese. In addition, after the Spanish-American War of 1898, the United States moved out into the world as an imperial power, annexing overseas territories with large populations of color for the first time. The Court had to decide the status of these new possessions and their inhabitants under the Constitution. All of these concerns involved issues of race and the interplay of race with policy, politics, and law.

Harlan long has been recognized as a defender of Black civil rights.<sup>4</sup> When he wrote a lone dissent in 1883 in the *Civil Rights Cases*,<sup>5</sup> Frederick Douglass described Harlan as “a moral hero” and his attitude as “one of marked moral sublimity.”<sup>6</sup> In another lonely dissent in *Plessy v. Ferguson*, the 1896 case in which the Court constitutionalized the principle of “separate but equal,” Harlan argued against classes of citizenship defined by race and, in a famous phrase, for a “color-blind” Constitution.<sup>7</sup> When, in 1954, *Brown v. Board of Education of Topeka*<sup>8</sup>

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and gone in the memory of his fellow citizens. I can understand why a man may be willing to give his whole life, and lead a life of poverty and self-denial if by so doing he can make a great name in his country.” John Marshall Harlan, *Constitutional Law Lectures 1897-1898*, at 13-14 (Nov. 20, 1897) [hereinafter Harlan, *Law Lectures*], *microformed on JOHN MARSHALL HARLAN PAPERS*, LIBRARY OF CONGRESS [hereinafter HARLAN PAPERS, LC], *available at* [http://archive.org/details/JusticeJohnMarshallHarlanLecturesOnConstitutionalLaw1897-98\\_2](http://archive.org/details/JusticeJohnMarshallHarlanLecturesOnConstitutionalLaw1897-98_2)

6. That Harlan valued his reputation so highly and sacrificed so much to leave behind a “great name in his country” makes it all the more important for those who would revise his reputation to tread carefully.

4. Westin, *supra* note 3.

5. 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

6. Frederick Douglass, *Civil Rights and Judge Harlan*, AMERICAN REFORMER, in HARLAN PAPERS, UL, *supra* note 1, at reel 7, frame 542. Douglass also wrote Harlan directly to express his “gratitude and admiration” and to assure Harlan that “if you are alone on the Bench, you are not alone in the Country.” Letter from Frederick Douglass to John Marshall Harlan (Nov. 27, 1883), in HARLAN PAPERS, UL, *supra* note 1, at reel 7, frame 541-43. Harlan’s high reputation among his Black contemporaries is illustrated by the fact that he was asked to, and did preside at the public Memorial for Douglass, held in Washington, D.C., in 1895, when the great Black abolitionist leader died. The Memorial gathering was attended by thousands of Black people. WASH. POST, June 3, 1895.

7. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

8. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

overturned *Plessy*, the resurrection of Harlan's powerful dissent, in support of Black equality before the law, elevated him to the status of a racial prophet.<sup>9</sup>

A few scholars have found gaps in Harlan's shining armor. They have challenged Harlan's reputation as a consistent defender of Black rights and have argued that he was insensitive to the rights of Native Americans.<sup>10</sup> The most serious challenge to Harlan's egalitarian reputation has come from scholars who have argued Harlan was anti-Chinese.<sup>11</sup> It is possible that Harlan's egalitarianism had limits. He was, after all, a man and not a prophet or a saint. But the conclusion that Harlan was anti-Chinese fails to do justice to the ambiguity of the evidence and the complexity of Harlan's entire record. The argument rests, largely, upon a letter he wrote to one of his sons, who was preparing for a college debate, and on measuring his votes in the Chinese immigration cases against modern standards of "due process" and "equal protection;" standards which had, in his time, yet to be fully articulated. His critics largely ignore other cases in which he defended the civil rights of Chinese already resident in the United States. They completely ignore Harlan's dissents in the *Insular Cases*, in the early years of the Twentieth Century, in which he demanded application of the entire

9. See *Hodges v. United States*, 203 U.S. 1, 20 (1906) (Harlan, J., dissenting); *Berea College v. Kentucky*, 211 U.S. 45, 60 (1908) (Harlan, J., dissenting); FLOYD B. CLARK, *THE CONSTITUTIONAL DOCTRINES OF JUSTICE HARLAN* (Decapods 1969) (1915); Louis I. Maddocks, *Justice John Marshall Harlan: Defender of Individual Rights* (1959) (unpublished Ph.D. dissertation, Ohio State University).

10. See J. Morgan Kousser, *Separate but Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J. S. HIST. 17 (1980); Earl M. Maltz, *Only Partially Color-Blind: John Marshall Harlan's View of Race and the Constitution*, 12 GA. ST. U. L. REV. 973 (1996) [hereinafter Maltz, *Only Partially Color-Blind*]. The two cases which are usually cited to show Harlan was not always pro-Black on civil rights are *Pace v. Alabama*, 106 U.S. 583 (1883) (upholding a state statute imposing harsher punishment for adultery between Black and White partners than between same race partners) and *Cumming v. County Board of Education of Richmond County*, 175 U.S. 528 (1899) (refusing to order the closing of a White public high school because a public Black high school was closed). See also, LINDA PRZYBYSZEWSKI, *THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN* 2-3, 99-102 (1999); Molly Townes O'Brien, *Justice John Marshall Harlan As Prophet: The Plessy Dissenter's Color-Blind Constitution*, 6 WM. & MARY BILL RTS. J. 753, 775 (1996) (discussing the *Cumming* decision and offering other explanations for Harlan's position). Additionally, the author further argues that Harlan was less egalitarian than originally believed; that he was paternalistic towards Blacks and believed in Anglo-Saxon racial superiority. *Id.* at 97-99, 119-24, 140-42.

11. See Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996) [hereinafter Chin, *The Plessy Myth*]; Gabriel J. Chin, *The First Justice Harlan by the Numbers: Just How Great Was "the Great Dissenter"*, 32 AKRON L. REV. 629 (1999); Maltz, *Only Partially Color-Blind*, *supra* note 10; see also PRZYBYSZEWSKI, *supra* note 10, at 97-99, 118-122; YARBROUGH, *supra* note 3, at 191-192.

Constitution to the inhabitants of color in the newly acquired overseas territories.

In this Article, I will discuss the evidence which has been offered to support the claim that Harlan was anti-Chinese and I will offer additional evidence never before presented to argue against this hypothesis. Harlan's critics have assembled some evidence in a way that suggests Harlan had an anti-Chinese bias. I will suggest that the evidence is ambiguous and that it can be assembled to produce a different picture from the one Harlan's critics create. I will also argue that his critics give insufficient weight to the fact that, sitting as a judge, Harlan was often constrained in his decision-making by *stare decisis* and his conception of the judicial role. The issues presented by the Chinese cases should be viewed in the context of their time and understood not as abstract statements of the Justices' personal beliefs but as a series of discrete judicial problems presented to the Court for decision. When one examines both the context and the details of the cases, the picture of Harlan that emerges is more nuanced than his critics have suggested.

Harlan's votes and opinions in the Chinese cases should not tarnish his reputation as a defender of civil rights.<sup>12</sup> They are better explained by his general approach to judicial decision-making and his generalized concerns about immigration, than by racial animus.<sup>13</sup> Even though he often deferred to the exercise of congressional power over Chinese immigration, Harlan was still a remarkably progressive judge when matters involving attacks on Chinese civil rights came before him. This is true, especially, in light of the beliefs about race which were pervasive in his time. By presenting my analysis, I hope to do justice to Harlan's reputation not as a prophet but as a human being.

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12. In an earlier article about the influence of religion on Harlan, I accepted generally the argument that Harlan was anti-Chinese without examining carefully all of the evidence cited in its support. Having now reviewed the evidence more fully and having thought more deeply about the question, I am now less inclined to accept that view for the reasons set out in this Article. See James W. Gordon, *Religion and the First Justice Harlan: A Case Study in Late Nineteenth Century Presbyterian Constitutionalism*, 85 MARQ. L. REV. 317, 395-402 (2001).

13. Three broad principles usually guided Harlan's judicial decision-making. First, he favored the exercise of broad national power in those areas assigned to the national government. Second, he favored judicial restraint, respecting the exercise of legislative power. Third, if possible, he preferred to read constitutional and legislative language literally. These three principles influenced many of Harlan's judicial positions. All three argued *for* sustaining national civil rights legislation guaranteeing Black Americans equal rights as citizens under the Reconstruction Amendments, which clearly had been enacted for their protection. The same principles argued *against* judicial intervention to overturn congressional decisions involving Chinese immigration.

## I. THE CONTEXT OF THE CHINESE CASES

The story of the Chinese in America and their struggle for civil rights in the last third of the nineteenth century has been well-told by a number of scholars and it is not my purpose to retell it here.<sup>14</sup> However, a brief outline of the story is necessary to provide context for the Chinese cases that came to Harlan's Court.

The Chinese suffered terrible discrimination in the United States in the late nineteenth and early twentieth centuries.<sup>15</sup> Anti-Chinese racism, fed by vicious stereotypes, created an atmosphere in which attacks on Chinese immigration and Chinese residents took place.<sup>16</sup>

The Chinese first came to the United States in large numbers in the 1840s. Most were young and male and came to labor in the gold fields or to establish trading ventures. Their status was first regulated by the Burlingame Treaty in 1868.<sup>17</sup> Under this treaty, Chinese subjects were guaranteed the right to come to, remain in, and leave the United States. They were also granted the privileges, immunities, and exemptions enjoyed by the citizens of the most favored nation. As their numbers

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14. Among the best scholarship on the subject is ANDREW GYORY, *RACE, POLITICS, AND THE CHINESE EXCLUSION ACT* (1998) and CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* (1994). See also STUART C. MILLER, *THE UNWELCOME IMMIGRANT: THE AMERICAN IMAGE OF THE CHINESE, 1785-1882* (1969); JEAN PFAELZER, *DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS* (2007); MARY ROBERTS COOLIDGE, *CHINESE IMMIGRATION* (1909), available at <http://www.archive.org/stream/chineseimmigrat00coolgoog> (Coolidge was a pioneering sociologist and her study is filled with important facts); LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRATION AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995); ELMER C. SANDMYER, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1971 reprt. 1939); ALEXANDER SXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1995).

15. For the history of the Chinese experience in the United States during these years, see ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943* (2007) and PFAELZER, *supra* note 14. For an in depth treatment of the genesis of the first Chinese Exclusion Act see GYORY, *supra* note 14; and COOLIDGE, *supra* note 14. For a general chronological survey of the legal history of Asian Americans, see HYUNG-CHAN KIM, *A LEGAL HISTORY OF ASIAN AMERICANS, 1790-1990* (1994). For an account of how the struggles of Chinese immigrants shaped modern immigration law, see SALYER, *supra* note 14. See also Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 17 HARV. J.L. & PUB. POL'Y 223 (1995) [hereinafter Maltz, *The Federal Government*].

16. The anti-Chinese feeling was strongest on the West Coast where most of the Chinese lived, but it was not limited to the Western states. See MILLER, *supra* note 14, at 167-172. For an interesting, gendered analysis of these stereotypes, see Karen J. Leong, "A Distinct and Antagonistic Race": *Constructions of Chinese Manhood in the Exclusionist Debates, 1869-78*, in AMERICAN DREAMING, GLOBAL REALITIES: RETHINKING U.S. IMMIGRATION HISTORY 141-157 (Donna R. Gabaccia & Vicki L. Ruiz, eds. 2006).

17. Treaty of July 28, 1868, U.S.-China, 16 Stat. 739.

increased their White neighbors became increasingly hostile to their presence. California became a focus of anti-Chinese activity. Many White Californians opposed Chinese immigration and sought to drive-out the Chinese who were already there. States and localities enacted laws discriminating against the Chinese and there were intermittent spasms of violence.<sup>18</sup> The Chinese community resisted these strategies in the political arena and, more successfully, for a time, in the courts.<sup>19</sup>

When the state of California tried to ban Chinese immigration outright, the law was struck down as an unconstitutional invasion of national power.<sup>20</sup> White Californians then shifted their focus and agitated for a national policy of exclusion. In 1880, China and the United States negotiated a new treaty that permitted the United States to limit, regulate, or suspend the entry of Chinese laborers into the country.<sup>21</sup> In 1882, with the sanction of the 1880 treaty, Congress passed the first Chinese Exclusion Act.<sup>22</sup> This statute suspended for a ten year "trial period" the right of Chinese laborers to enter the country. It also required those already legally here to obtain identity certificates when they went abroad if they wished to be readmitted to the country upon their return.<sup>23</sup> The act further required Chinese merchants and others still permitted entry into the United States to obtain certificates from their home countries, vised by American diplomatic officials stationed there, certifying facts that established they were qualified (as non-laborers) to enter.<sup>24</sup>

This Exclusion regime was refined and tightened over the next twenty years. After an 1884 amendment, Chinese laborers previously resident in the country could re-enter only if they could produce the required identification certificate, which now became the only acceptable proof of prior residence.<sup>25</sup> The Scott Act of 1888 went further. It voided existing certificates thus denying the right to re-enter the country even to those who had fully complied with the earlier acts.<sup>26</sup>

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18. See MCCLAIN, *supra* note 14, at 9-144. For many examples of violence directed at the Chinese, see PFAELZER, *supra* note 14.

19. MCCLAIN, *supra* note 14.

20. *In re Ah Fong*, 1 F.Cas. 213 (1874). Shortly thereafter, the Supreme Court held that the regulation of immigration was a matter solely for the national government. *Chy Lung v. Freeman*, 92 U.S. 275 (1875).

21. Treaty of Nov. 17, 1880, U.S.-China, 22 Stat. 828.

22. Act of May 6, 1882, ch. 126, §§ 1-15, 22 Stat. 58, 58-61.

23. For details of the various Exclusion Acts, see MCCLAIN, *supra* note 14.

24. Act of May 6, 1882, ch. 126, § 6, 22 Stat. 58.

25. Act of July 5, 1884, ch. 220, § 4, 23 Stat. 115, 115-16.

26. Act of Oct. 1, 1888, ch. 1064, §§ 1-4, 25 Stat. 504.

The Geary Act of 1892 extended for another ten years all existing exclusion legislation and required all Chinese laborers residing in the United States to obtain a certificate of residence (identity papers) within one year or be subject to summary deportation.<sup>27</sup> The Geary Act also created a presumption that any Chinese laborer without a certificate was in the country illegally. Fearing perjury by Chinese witnesses, the Geary Act also required testimony from at least one White witness to prove legal residence prior to the act where the certificate or a duplicate from the customs records could not be produced. Under the Geary Act, any Chinese person who did not, or could not, comply with the Act, could be sentenced to one year in prison at hard labor before being deported.

In 1902 the various Exclusion Acts were renewed and applied to the new island territories annexed at the end of the Spanish-American War and to Hawaii.<sup>28</sup> Finally, in 1904, they were extended indefinitely.<sup>29</sup> In the years following each of these enactments, the federal courts, in applying the Exclusion regime, decided many cases requiring interpretation of congressional intent. The courts also faced repeated claims for protection against government discrimination and mob violence directed at lawfully resident Chinese. A number of these cases made their way to the Supreme Court upon which Justice Harlan sat.

Recent scholarship suggests that the traditional notion that the United States had essentially welcomed all immigrants before concerns about Chinese immigration all but closed the "golden door" was a myth.<sup>30</sup> Still, there is little doubt that the enactment of the Chinese Exclusion regime moved immigration restriction to the center of national concern and energized an intensive push for immigration restriction that produced a series of restrictive laws in the fifty years which followed.

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27. Act of May 5, 1892, ch. 60, §§ 1, 6, 27 Stat. 25, 25-26.

28. Act of Apr. 29, 1902, ch. 641, § 1, 32 Stat. 176-77.

29. Act of Apr. 27, 1904, ch. 1630, § 5, 33 Stat. 428, 428. The Exclusion regime remained in place until 1943.

30. See Tyler Anbinder, *Nativism and Prejudice Against Immigration*, in *A COMPANION TO AMERICAN IMMIGRATION 177-201* (Reed Ueda ed., 2006); Hidetaka Hirota, *The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy*, 99 J. AM. HIST. 1092 (Mar. 2013); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1876)*, 93 COLUM. L. REV. 1833 (1993). The "golden door" image is drawn from Emma Lazarus's famous poem "The New Colossus." Ironically, Lazarus wrote the poem in 1883, one year after the golden door had been closed for the Chinese by the first Chinese Exclusion Act. Even more ironically, in 1903 her words were attached to the pedestal of the Statue of Liberty in New York harbor to become part of the symbol of America's welcome to immigrants. Of course, it might be observed, the Statue of Liberty faces the Atlantic and not the Pacific to welcome Europeans, not Asians.



## II. THE EVIDENCE OFFERED BY HARLAN'S CRITICS

Some modern scholars have argued that Harlan was anti-Chinese; that he was, at best, only "partially color-blind."<sup>31</sup> They suggest Harlan failed to apply the principle of equality before the law to the Chinese that he famously demanded for Black Americans. These critics imply or expressly allege that the source of this differential treatment was Harlan's anti-Chinese racism. One scholar concluded: "Harlan rather plainly shared the widespread prejudice against the Chinese that led to the passage of the Exclusion Acts and the Geary Act."<sup>32</sup> While acknowledging that Harlan's record even in the Chinese immigration cases was mixed, these scholars have failed to give sufficient weight to his position in other cases involving the rights of Chinese already resident in the country. They give little or no consideration to the role played by Harlan's default positions favoring national power and judicial restraint in explaining the immigration cases and dismiss the parallels in his positions in defense of Black civil rights and his defense of these rights for the Chinese.<sup>33</sup> Although Harlan's most recent biographers

31. See Chin, *The Plessy Myth*, *supra* note 11; Chin, *Harlan By the Numbers*, *supra* note 11; Maltz, *Only Partially Color-Blind*, *supra* note 10. A recent search of citing references on Westlaw disclosed that Professor Chin's, *The Plessy Myth*, has been cited in eighty-two law review articles; his *Harlan By the Numbers*, in fourteen; and Professor Maltz's *Only Partially Color-Blind*, in fourteen. Almost all of these articles cite the Chin and Maltz articles as proof that Harlan was anti-Chinese. Even the web's WIKIPEDIA entry on Harlan states: "Harlan was also viewed by some as oppositional toward other races, such as Chinese." John Marshall Harlan, WIKIPEDIA.ORG, [http://en.wikipedia.org/wiki/John\\_Marshall\\_Harlan](http://en.wikipedia.org/wiki/John_Marshall_Harlan) (last visited May 14, 2014).

32. Maltz, *Only Partially Color-Blind*, *supra* note 10, at 1001.

33. Chin cites far more cases than does Maltz and acknowledges the complexity of Harlan's voting record in these cases.

Harlan's work in interpreting the nuances of the regime of exclusion laws was more mixed after the constitutionality of racial exclusion was settled. For example, he twice joined decisions of the Court finding in favor of Chinese deportees on the facts. He interpreted some provisions of the exclusion laws in favor of Chinese immigrants. Finally, Harlan joined a unanimous Court in holding that the Constitution required indictment and jury trial before a deportable Chinese person could be criminally punished for being in the United States. More often, though, he construed ambiguous sections of statutes and treaties against Chinese litigants.

Chin, *The Plessy Myth*, *supra* note 11, at 161-62. Maltz makes a similar acknowledgment when he writes:

Obviously this attitude [as expressed in Harlan's reference to the Chinese in his *Plessy* dissent] did not predispose Harlan to support Chinese claims of constitutional rights. At the same time, however, Harlan remained committed to the concept that the Constitution protected natural rights, and to a broad conception of federal power to enforce those rights. Given these sometimes conflicting factors, it is not surprising that Harlan's voting record on cases involving the rights of the Chinese was somewhat mixed.

Maltz, *Only Partially Color-Blind*, *supra* note 10, at 1002.

have found the evidence persuasive,<sup>34</sup> the evidence is limited. It consists of: (1) some ill-chosen words Harlan included in his *Plessy* dissent making reference to the Chinese (what I will call the *Plessy* fault); (2) a letter Harlan wrote to one of his sons in 1883, suggesting lines of argument the younger man might use in a college debate; (3) remarks he made during his constitutional law lectures in 1898;<sup>35</sup> and (4) the critics interpretation of his votes and opinions in the cases involving the Chinese which came to the Supreme Court while he served on the high bench. Since Harlan wrote in only a handful of these cases, much of their interpretation rests on his silent participation in the opinions of others.

Harlan's critics relegate to insignificance or rationalize away other

34. See PRZYBYSZEWSKI, *supra* note 10, at 120-22, 233 n.24; see also YARBROUGH, *supra* note 3, at 190-92.

35. PRZYBYSZEWSKI, *supra* note 10, at 120-21. A student asked Harlan whether a person born in the United States to Chinese non-citizen parents could be a citizen. After warning he could not answer the question because of a pending case (*Wong Kim Ark* discussed *infra* Part III.C) and:

stressing that he was "now giving the argument for one side," he noted that the Chinese had long been excluded "upon the idea that this is a race utterly foreign to us and never will assimilate with us." They were pagans. Neither the Chinese nor the Americans wanted to intermarry. "And when they die, no matter how long they have been here, they make arrangements to be sent back to their Fatherland."

He then asked his students "what would be the condition to-day" of the western slope without the exclusion acts. [V]ast numbers of Chinese "would have rooted out the American population." . . . "Of course, the argument on the other side is that the very words of the constitution embrace such a case."

*Id.* Although at first blush these ideas suggest an anti-Chinese bias, it is important to recognize that they are also an accurate description of the views expressed by various Justices (other than Harlan) in earlier Court opinions. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). Since he was teaching a class focused on constitutional law, it was appropriate for Harlan to reply to the student's question by reporting what the Court had previously written on the subject.

The above exchange took place at a lecture Harlan gave on March 19, 1898. The decision in *Wong Kim Ark* was handed down on March 28, 1898. Almost certainly, Harlan had the case law and the arguments for and against *Wong Kim Ark* fresh in his mind not only from the arguments of counsel, but also from the arguments made by his fellow justices in conference. It also seems likely that he was already aware of what the opinions in the case would say.

After citing the exchange with Harlan's students, Professor Przybyszewski discusses Fuller's dissent in *Wong Kim Ark*, in which Harlan joined, implying that Harlan's statements to his class reflected his own views on the matter. Given the repeated warnings he gave to his students, that he could not answer because the case was pending and that he was only offering arguments, it seems he was carefully denying that he was speaking his own views. It is possible that Harlan was merely offering the arguments he had recently heard made in support of exclusion and the denial of citizenship to the Chinese, rather than stating his own views. Sometimes a speaker or writer means only what he or she says or writes, and there is no deeper meaning than what the words themselves say.

important evidence of Harlan's attitude toward the Chinese.<sup>36</sup> He insisted that the Court take seriously treaty obligations benefitting the Chinese.<sup>37</sup> He asserted that the Fourteenth Amendment's Equal Protection Clause and federal civil rights statutes protected Chinese residents against state and local discrimination, justified by local authorities under the police power.<sup>38</sup> On the same grounds, he justified the use of national power to protect the Chinese from mob violence.<sup>39</sup> Furthermore, in his dissents in the *Insular Cases*, after American annexation of Puerto Rico, the Philippines, and Hawaii, Harlan argued fiercely and repeatedly that residents of the annexed territories, without regard to race or national origin, were entitled to all of the Constitutional protections embodied in the Bill of Rights and other American law.<sup>40</sup> Harlan's critics have either ignored these decisions or have dismissed their implications for the argument that Harlan was anti-Chinese.<sup>41</sup>

Finally, in looking only at Harlan's response to the Chinese, his critics have overlooked the more generalized nativist strand in Harlan's thought, which, though muted in his later years remained an influence making him suspicious of all immigrants without regard to their race.<sup>42</sup>

#### A. *The Plessy Dissent Fault in Context*

Harlan's critics often quote a paragraph from Harlan's *Plessy* dissent, which they argue reveals a racist fault. In *Plessy*, Harlan wrote:

There is a race so different from our own that we do not permit those

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36. See, for example, Professor Chin's treatment of Harlan's *Chew Heong* opinion and the Court's *Yick Wo* decision. Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About Yick Wo*, 2008 U. ILL. L. REV 1359 (2008).

37. *Chew Heong v. United States*, 112 U.S. 536 (1884).

38. *Baldwin v. Franks*, 120 U.S. 678, 694 (1887) (Harlan, J., dissenting); *Yick Wo v. Hopkins*, 112 U.S. 356 (1886).

39. *Baldwin*, 120 U.S. at 694 (Harlan, J., dissenting).

40. *Downes v. Bidwell*, 182 U.S. 244, 375 (1904) (Harlan, J., dissenting); *Dorr v. United States*, 195 U.S. 138, 154 (1904) (Harlan, J., dissenting); *Hawaii v. Mankichi*, 190 U.S. 197, 226 (1903) (Harlan, J., dissenting).

41. Neither Chin nor Maltz discuss the *Insular Cases* at all. Przybyszewski and Yarbrough both address the *Insular Cases* but do not connect them with Harlan's attitude toward the Chinese. As a result, they all overlook what I believe was Harlan's ultimate reconciliation of whatever views on the Chinese he held, with republicanism—a resolution his dissents in the *Insular Cases* embody.

42. See Harlan's reflections on his participation, in the 1850s, in the American Party (the Know-Nothing Party) which he regretted. Despite his regrets, Harlan continued to rationalize that membership and continued to speak with concern about the negative effect of white immigrants who had no understanding of, or experience with, American institutions. John Marshall Harlan, *The Know-Nothing Organization*, in HARLAN PAPERS, LC, *supra* note 3, at reel 8, frame 377-88. See also Westin, *supra* note 3.

belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race [cannot] . . .<sup>43</sup>

As one examines the problematic quotation three things stand out. First, in context, it is apparent that Harlan was using the reference to discrimination against the Chinese to challenge the unequal treatment of African-Americans, not to support discrimination against the Chinese. Harlan offered the reference to show the irrationality of discrimination against Blacks, who were expressly protected in their rights *as citizens* by the Fourteenth Amendment, while similar discrimination was not, theoretically, directed at the non-citizen Chinese. Harlan's argument was that citizens should have more, not fewer, rights than aliens, not that aliens should have no rights.

Second, Harlan is not endorsing the popular attitudes underlying discrimination against the Chinese, but rather, describing those attitudes. That he would have the example of the Chinese in mind when discussing discrimination is not surprising given the number of cases involving the Chinese which came to the Court in the 1880s and 1890s.

Third, and perhaps most importantly, it is clear from the entire dissenting opinion in *Plessy* that Harlan is challenging distinctions *among citizens* based on race. If the Chinese became citizens, they also would fall within the protection of the Fourteenth Amendment guarantees of equality *among citizens* of the United States without regard to their race.<sup>44</sup> That Harlan read the language of the Amendment

43. *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J. dissenting). See Chin, *The Plessy Myth*, *supra* note 11, at 156; see also Maltz, *Only Partially Color-Blind*, *supra* note 10, at 1002. There have been even harsher characterizations of Harlan's choice of language in *Plessy*. Professor Neil Gotanda described Harlan's references to the "dominance" of the White race in *Plessy* and to the Chinese, as "unambiguous statements about the Chinese and their racial position." Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1701 (2000). Gotanda continued: "In Harlan's vision, the Chinese were unqualified to become Americans. They were not so necessarily inferior; rather, they were so different that they were properly excluded from citizenship. Harlan was consistent and forceful in his advocacy of this position." *Id.* at 1702.

44. Harlan said as much elsewhere in the *Plessy* dissent: "The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of *all citizens* of the United States, without regard to race." *Plessy*, 163 U.S. at 560 (emphasis added). Harlan's dissent in one of the *Insular Cases*, *Downes v. Bidwell*, 182 U.S. 244 (1901), made this same point explicitly:

Whether a particular race will or will not assimilate with our people, and whether

literally seems clear when one considers the Justice's other opinions in cases involving assertions, by Chinese petitioners, of rights claimed under treaties or as "persons" under the Fourteenth Amendment.<sup>45</sup> By 1896, when Harlan penned these words in *Plessy*, the denial of Chinese admission to citizenship through naturalization had been (for the time being) settled by Congress and acquiesced in by the Court so often that it was no longer open to question.<sup>46</sup>

For Harlan, the literal distinction the language of the Fourteenth Amendment made between citizens and non-citizens was important. It partly explains his greater solicitude for the rights of Black Americans than for those of the Chinese. In the same paragraph in which he made the quoted reference to the Chinese, he was explicit on this point. The Black citizens of Louisiana, discriminated against by the *Plessy* statute, unlike the Chinese at the time,

[were] entitled, by law, to participate in the political control of the state and nation, . . . not excluded, by law or by reason of their race, from public stations of any kind, and who [had] all the legal rights that belong to white citizens, [but they are] declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.<sup>47</sup>

It is true that Harlan argued that Blacks had earned these rights and, although it has been suggested that the reference invidiously pits one disadvantaged race against another,<sup>48</sup> Harlan's reference to Blacks

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they can or cannot with safety to our institutions be brought within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty. A mistake in the acquisition of territory . . . cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions.

*Id.* at 384. He made the same point in the letter, *infra* Part II.B, he wrote to his son suggesting lines of argument the son might use in a debate about the Chinese Exclusion Act of 1882. "If they [Chinese laborers] come, we must admit them to citizenship, then to suffrage" and that means extending to them all of the rights of citizens because "*all citizens are made equal before the law.*" Letter from John Marshall Harlan to James Shanklin Harlan (Jan. 21, 1883), in HARLAN PAPERS, LC, *supra* note 3, at reel 1, frame 296-298 (emphasis added).

45. See Harlan's opinions in *Chew Heong*, *Baldwin v. Franks*, and the *Insular Cases* *infra* Part III.B and text accompanying notes 171-84, 249-66.

46. See Act of May 6, 1882, ch. 126, § 14, 22 Stat. 61 ("hereafter no state court or court of the United States shall admit Chinese to citizenship") (repealed 1943). The Court would not revisit this question until 1898 when in *Wong Kim Ark* the Court had to decide whether children born in the United States to resident non-citizen Chinese were citizens by birth under the Fourteenth Amendment. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

47. *Plessy*, 163 U.S. at 561.

48. See Chin, *The Plessy Myth*, *supra* note 11, at 175-76; see also PRZYBYSEWSKI, *supra* note 10, at 121 (discussing this language). However, Harlan's words may be nothing more than a reference to Frederick Douglass' famous argument that if Blacks fought for the Union, they would earn the rights of citizenship. See JAMES M. MCPHERSON, *BATTLE CRY*

"many of whom, perhaps, risked their lives for the preservation of the Union," in context, seems no more than a reference to the costliest duty of citizenship: the duty to fight, bleed, and, if necessary, die for one's country. Many public figures who, like Harlan, had experienced the hardships of military service during the Civil War and seen Black regiments in the field, believed that African-Americans had earned the explicit reference to their citizenship in the Fourteenth Amendment by their service to the Union.

It is also important to remember that Harlan's analytic framework for his *Plessy* dissent was the Thirteenth and Fourteenth Amendments' explicit references to Blacks as a formerly enslaved and now constitutionally protected race. As Harlan said explicitly in his *Plessy* dissent: "[These Amendments] had, as this court has said, a common purpose, namely, to secure 'to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy.'"<sup>49</sup> The protection extended was protection of the rights Black Americans possessed under the new constitutional guarantees of citizenship embodied in the Fourteenth Amendment, which had overturned Chief Justice Taney's infamous denial of Black citizenship in *Dred Scott*.<sup>50</sup> For Harlan, as for most of his contemporaries who espoused legal equality for Blacks, the Fourteenth Amendment was made necessary by the *Dred Scott* decision—a decision about *citizenship* and *Black* Americans. Given this context, it was natural for Harlan to think of these issues in terms of Black and White.

One scholar has criticized Harlan for his "formalist" reading of the Fourteenth Amendment.<sup>51</sup> The criticism of Harlan in this respect amounts to two charges. First, it implies that Harlan was wrong because he did not give the Fourteenth Amendment *then* the broader and far more appealing construction it receives *now*. Although all *today* would agree that the Equal Protection clause of the Fourteenth Amendment reaches far beyond African-Americans, it seems unfair to condemn Harlan for interpreting the language of the amendment as it was generally understood in his own time rather than anticipating almost one hundred years of yet to be developed judicial articulation of the amendment.<sup>52</sup> If

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OF FREEDOM: THE CIVIL WAR ERA 564 (1988) (quoting DOUGLASS' MONTHLY, Aug. 1863).

49. *Plessy*, 163 U.S. at 555-56.

50. *Dred Scott v. Sandford*, 60 U.S. 393, 393 (1857).

51. "Harlan applied a formalistic approach to the Fourteenth Amendment. Although in some sense plausible, Harlan's understanding of the Equal Protection Clause did not include what *now* seems to be its most attractive feature: a notion of at least legal equality among all races." Chin, *The Plessy Myth*, *supra* note 11, at 171 (emphasis added).

52. See John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese*

Harlan had been so prescient as to anticipate these future developments, one wonders whether he would have been willing, strategically, to rest his defense of Black rights on these expansive grounds when the struggle for equal treatment before the law for Black Americans was in so precarious a state in 1896 even when supported by the literal language of the Amendment.

Second, while acknowledging Harlan's tendency to default to strict construction, by using the word "formalism" (with its negative connotations), it is implied that Harlan should have abandoned this approach in order to extend the protection of the Amendment to defend the Chinese. The argument that Harlan was formalistic in his approach to the Fourteenth Amendment assumes that formalism is always a pose, masking a different, deeper motivation. But, sometimes a literal, formalist posture is an honest, if not entirely sufficient, approach to judicial analysis. Strict construction was not merely a pose for Harlan, clothing he put on or took off at pleasure. Rather, it was part of his essential approach to statutes and the Constitution, growing, perhaps, out of his strict Old School Presbyterian biblical literalism. Harlan's first reading of any text was a literal reading. He went beyond this approach only when he believed the language ambiguous or contradicted by the ends the language was intended to accomplish. Harlan's literalism in his reading of the Civil War Amendments in *Plessy* is similar to the approach he took to most texts.

If Harlan did give "overwhelming weight [in *Plessy*] to the circumstances which gave rise to the Reconstruction Amendments,"<sup>53</sup> this fact seems scarcely a valid criticism in the face of Harlan's conception of judicial role. Harlan often argued for judicial restraint and many of his most vociferous denunciations of Court majorities involved what he considered to be the unwarranted assertion of judicial power in usurpation of the legislative or political function.<sup>54</sup>

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*Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L. J. 55, 79-82 (1996); Maltz, *The Federal Government*, *supra* note 15; *see also* EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 63-67 (1990).

53. Chin, *The Plessy Myth*, *supra* note 11, at 171.

54. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 82 (1911) (Harlan, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Harlan, J., dissenting), *overruled in part by* *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Pollock v. Farmers Loan & Trust*, 158 U.S. 601, 638 (1895) (Harlan, J., dissenting); *United States v. E.C. Knight Co.*, 156 U.S. 1, 18 (1895) (Harlan, J., dissenting); *see also* Harlan, Law Lectures (Dec. 11, 1897), in HARLAN PAPERS, LC, *supra* note 3, at 9 ("[T]he rule is fundamental both in reference to state and federal constitutions that the judiciary shall not declare an act of Congress unconstitutional unless it is plainly and palpably so . . ."); Harlan, Law Lectures (Jan. 22, 1898), in HARLAN

Some of Harlan's critics have pointed to other language in his *Plessy* dissent, to suggest that Harlan was infected with Anglo-Saxon race pride.<sup>55</sup> Of course, it is possible that Harlan was proud of his ancestry, as he was proud of his Presbyterian faith, without assuming he would denigrate the ancestry or religion of others. But, I suggest, even this reading divorces his words from their context in the dissent. In the opinion itself, it is clear that Harlan was offering the comment about pride of race not to lift up Whites, or to diminish Blacks or other persons of color, but rather to shame his white auditors into living up to the equality before the law that he believed was the genius of the American legal and political tradition. His words were less an argument about Anglo-Saxon superiority than a demand that Whites live up to their own ideals as he understood them. If one reads the pseudo-scientific, racial rationale for the Kentucky Court of Appeals' opinion in *Commonwealth v. Berea College*<sup>56</sup> and Harlan's dissent, when the case came to the Supreme Court on appeal, rejecting that rationale, it is hard to conclude that he believed in the physical and genetic superiority of Whites and the inferiority of other races. Harlan's dissent repudiated the elaborate racial theory upon which the court below had based its decision, with a few well-chosen words.<sup>57</sup> However, the question whether Harlan took pride in his Anglo-Saxon ancestry or not misses the more important point.

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PAPERS, LC, *supra* note 3, at 18-19 ("[N]o court [should] . . . strike down an act of legislation as unconstitutional and void unless it is clearly so . . . . [W]hen the question arises as to whether a particular law does or does not transcend the authority of the government, if the court doubts, its duty is to hold its hands off; respect the will of the people expressed in this law . . . .").

55. PRZYBYZSEWSKI, *supra* note 10, at 87. But, Professor Przybyzsewski quotes only part of the paragraph that Harlan wrote. The entire paragraph reads:

*In respect of civil rights, common to all citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States.*

*Plessy v. Ferguson*, 163 U.S. 537, 554-555 (1886) (Harlan, J., dissenting) (emphasis added).

56. *Commonwealth v. Berea College*, 94 S.W. 623 (Ky. 1906).

57. "Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes, simply because of their respective races?" *Berea Coll. v. Commonwealth*, 211 U.S. 45, 69 (1908) (Harlan, J., dissenting).



Harlan demanded equal treatment before the law for all men, of whatever color, and insisted that the protections of the Constitution, not expressly limited to citizens, apply to all persons within the jurisdiction of the United States.<sup>58</sup> In the eyes of the law, he argued over and over again, color did not matter.<sup>59</sup>

B. *The Letter: Harlan Suggests Lines of Argument in Support of Chinese Exclusion for a Princeton University Debate*

Perhaps the most damning piece of evidence used to support the hypothesis that Harlan was an anti-Chinese racist is a private letter he wrote to his son James, in 1883.<sup>60</sup> James was an undergraduate at

58. See *infra* text accompanying notes 159-74, 259-266.

59. See *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting); *Baldwin v. Franks*, 120 U.S. 678, 694 (1887) (Harlan, J., dissenting); *Elk v. Wilkins*, 112 U.S. 94, 110 (1884) (Harlan, J., dissenting). The Insular Cases *infra* Part III.B and text accompanying notes 171-84, 249-66.

60. Chin, *The Plessy Myth*, *supra* note 11, at 160 (quoting letter from John Marshall Harlan to James Shanklin Harlan (Jan. 21, 1883), in HARLAN PAPERS, LC, *supra* note 3, at reel 1, frame 296-98); see also YARBROUGH, *supra* note 3, at 190-92. The text of the letter is set out below.

Washington DC

Jan 21/83

Dear James,

The speeches of Senators Jones and Miller will give you, I suppose, all the facts you need for your debate. I do not know what they said, but I suggest this line of thought.

The first duty of every man is to his own household. Upon these thoughts we owe to our country & people a higher duty than one owed to any other country or people. Therefore, the first inquiry over the Chinese bill is what is best for our own country. We are not bound, upon any broad principle of humanity, to harm our own country in order to benefit the Chinese who may come here. We have, in our keeping, the destiny of republican institutions – that is, *here* is to be tested the stability of free institutions, based upon the consent of the people & under which all citizens are made equal before the law – Now if by the introduction of Chinese labor we deprive[?] our own laborers, why not restrict the immigration of Chinese – The Chinese are of a different race, as distinct from ours as ours is from the negro – Suppose there was a tide of immigration setting in here from America [sic] of uneducated African savages – would we not restrict their coming? Would we desist because they are human beings & upon the idea that they have a right to better their condition? The Chinese are, largely, educated – But not those coming here – And of those coming [?] many are against – will not assimilate to our people. If they come, we must admit them to citizenship, then to suffrage – what would become of the country in such a contingency. Under the 10 year statute we have the opportunity to test the question whether it is safe to let down the bars & permit unrestricted immigration – The Chinese here will, in that time, show of what stuff they are made – Our policy is to keep this country, distinctively, under *American* influence. Only Americans, or those who become such, by long stay here, understand *American* institutions.

I hope you will go into that debate, & talk out as if you did not care for

Princeton and was to participate in a formal debate over the Chinese Exclusion Act of 1882. Justice Harlan offered to help him with his preparation. There are a number of reasons for one to be cautious in drawing conclusions about Harlan's personal views from this letter.

First, and most obviously, we cannot know whether Harlan was expressing his own views, or merely suggesting lines of argument which he believed might have persuasive force in a formal college debate. Some of Harlan's critics acknowledge this problem, but go on to suggest that Harlan believed what he wrote.<sup>61</sup> Without this letter, the other evidence is far more ambiguous. Indeed, without it, one wonders whether the argument that Harlan was an anti-Chinese racist would have been made at all.

It seems unlikely that Harlan would express his personal views, even in a private letter, on a matter which he must have known would eventually come to the Court upon which he sat for resolution. We know that Harlan routinely refused to discuss publicly legal issues that might come to the Court, noting that he must not pre-judge them. It would be surprising if he violated what was for him such an important principle, even in a private letter to his son.

Second, it seems certain that Harlan wrote this letter hastily, without time for research or reflection. The physical characteristics of the letter itself suggest haste with its obvious mistakes. The letter contains a series of sentence fragments, some almost incoherent, connected with dashes. Additionally, the handwriting in the letter is even more difficult to decipher than his usual script, suggesting that he scribbled the note.

Other correspondence indicates that Harlan sent his suggestions for argument on short notice. After learning that his son, James, was to

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the result. Once break the ice, & you will have no trouble. But the think [sic] is to break the ice & plunge in. All well

affy  
Father

Letter from John Marshall Harlan to James Shanklin Harlan (Jan. 21, 1883), in HARLAN PAPERS, LC, *supra* note 3, at reel 1, frame 296-98. Harlan often used the phrase: "then what would become of the country?" or similar language rhetorically in his lectures on the Constitution when he "supposed" a proposition and wanted his students to consider the practical effects of applying that proposition. See Harlan, Law Lectures (Oct. 21, 1897), in HARLAN PAPERS, LC, *supra* note 3, at 9; *Id.* at 14 (Oct. 30, 1897); *Id.* at 9 (Nov. 13, 1897); *Id.* at 11, 17-18 (Dec. 18, 1897); *Id.* at 9, 12 (Dec. 18, 1897); *Id.* at 4 (Jan. 15, 1898).

61. "There is, of course, the literal point that these views were only an argument; Harlan did not adopt them as his own." Chin, *The Plessy Myth*, *supra* note 11, at 160. Yarbrough makes this same point in his Harlan biography but then qualifies it. YARBROUGH, *supra* note 3, at 191. For comparable treatment of a recitation of arguments against Chinese citizenship in Harlan's law lectures, see PRZYBYSEWSKI, *supra* note 10, at 120-21.

participate in the debate, Harlan offered, in a letter to James, dated January 7, 1883, to help his son prepare. "If you know the subject [of the debate] in time I may be able to give you some aid with books, suggestions &c."<sup>62</sup> On Saturday, January 20, Harlan's wife, Mallie, responded to a letter from James asking for his father's help:

Your letter of yesterday is just received and I write hurriedly to say that papa will send you something on your question for debate at *latest* by Tuesday Morning. This is his busiest day in Court and unless the Senate is in session he may not be able to get anything before Monday. If the Senate is in session he can write to some friend there and get what he wants but will not have time today to look it up himself. He doubts whether you have last winter's Congressional Report yet in Princeton. He will attend to it at once, of that you may be sure . . . .<sup>63</sup>

Harlan's letter offering pro-exclusion arguments is dated the next day, Sunday, January 21, 1883.<sup>64</sup> He does appear to have obtained some material because a letter a week later from Mallie to James asks: "Did you get the papers on speeches your papa sent you?"<sup>65</sup> It is clear from this correspondence that Harlan did not have information about the topic in his own possession and that he had time neither to research nor to reflect much on what he wrote.

Third, turning to the content of Harlan's letter, the first thing one may notice is that the arguments he offered were not well fleshed-out. They were lightly sketched and superficial, exhibiting neither the refinement of thought nor the logical arrangement that one would expect from someone with Harlan's intellectual depth and eloquence. Rather, the ideas were offered almost in stream-of-consciousness. This may suggest he had no more than the kind of superficial familiarity with the issue that any person aware of public affairs would have had. The

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62. Letter from John Marshall Harlan to James Shanklin Harlan (Jan. 7, 1883), in HARLAN PAPERS, LC, *supra* note 3, at reel 1, frame 286.

63. Letter from Malvina Shanklin Harlan to James Shanklin Harlan (Jan. 20, 1883), in HARLAN PAPERS, LC, *supra* note 3, at reel 1, frame 294-95. The letter from James to his father is not preserved in the HARLAN PAPERS, LC. That year, January 20, 1883 was a Saturday, so Harlan's response was written on Sunday. Since Harlan, a devout Old School Presbyterian, kept a traditional Sabbath on Sundays, it is unlikely he did any research that day before replying to James' letter.

64. Letter from John Marshall Harlan to James Shanklin Harlan (Jan. 21, 1883), in HARLAN PAPERS, LC, *supra* note 3, at reel 1, frame 296.

65. Letter from Malvina Shanklin Harlan to James Shanklin Harlan (Jan. 29, 1883), in HARLAN PAPERS, LC, *supra* note 3, at reel 1, frame 299-300. The "papers" to which Mallie refers may have been newspaper accounts of the Congressional debates; or perhaps Harlan sent James copies of the Congressional Debates of the preceding February and March.

particular ideas themselves, as presented, do not so much address the unique questions posed by Chinese immigration as touch general nativist ideas that Harlan already entertained. They suggest the reasons he seems to have favored immigration restriction generally.<sup>66</sup>

It also seems peculiar that Harlan began his letter by referring his son to the speeches of Senators Miller and Jones because he "suppos[ed]" they would provide "all the facts you need" while acknowledging "I do not know what they said[!]"<sup>67</sup> All of this suggests that, in his scramble to reply to James, Harlan might have sought advice from someone more knowledgeable about the issues surrounding Chinese immigration than he was himself. If Harlan had known more himself about the details of the Congressional debates, he likely would have referred his son to more balanced sources.<sup>68</sup>

The sources of information about the Chinese available to Harlan on a Saturday, when he was (according to Mallie's letter) "busy in court," were limited. Unlike with Black Americans, he had no direct personal experience with Chinese people to disabuse him of stereotypes. Harlan might have had quick access to the Report of the Congressional Special Committee on Chinese Immigration published in February, 1877.<sup>69</sup> Despite publishing 1,200 pages of testimony that painted a

66. See *supra* text accompanying notes 61-65.

67. Senators John Franklin Miller (R-California) and John Percival Jones (R-Nevada) both supported exclusion. Miller had introduced the Chinese Exclusion bill in the Senate and took the lead, on behalf of the exclusionists, in the 1882 Senate debate. Miller "is chiefly known for the active part he took in the anti-Chinese legislation . . ." 6 pt. 2 *DICTIONARY OF AMERICAN BIOGRAPHIES* 631 (Dumas Malone, ed., 1933). Jones supported him. The speeches of both Miller and Jones were, in fact, laced with racist rhetoric. If Harlan had followed the 1882 senate debate, he could not have missed the obvious link between the racist arguments offered against the Chinese and the same arguments his southern contemporaries made against Black equality. See GYORY, *supra* note 14, at 228-230; see also McClain, *supra* note 14, at 81 (for a discussion of the role Miller played in the state convention of 1880-81). The entire debate is set out at 13 CONG. REC. S1481-1488, 1515-1523, 1545-1550, 1581-1591, 1634-1646, 1667-1675, 1702-1717, 1738-1754 (Feb. 28, Mar. 1-3, 6-9, 1882).

68. Harlan might have consulted his friend, Senator George F. Hoar (R-Massachusetts), who, in the same debates, attacked Chinese exclusion. Hoar had been Miller's leading opponent in the debate over the 1882 Act. See *Nestor of the High Bench*, WASH. POST, Apr. 16, 1905. Unfortunately, James' letter requesting his father's help apparently has not survived, as I have been unable to locate it in the Harlan Papers. It is possible that James requested only material *against* Chinese immigration; that he was to argue only in favor of Chinese exclusion, or that his father offered arguments on the other side in separate, lost, correspondence. One cannot construct an argument on what is missing from the historical record, but neither should one put too much emphasis on one isolated letter when we know so little about the context in which it was written.

69. S. REP. NO. 689 (1877). For a careful critical analysis of the Senate report, see COOLIDGE, *supra* note 14, at 96-108. If Harlan were familiar with the Report, it seems likely he would have made reference to it for use in debate preparation in his letter to James. The

mixed picture of benefits and burdens, the six-page Committee Report pointed only to the problems caused by Chinese immigration and did so in strikingly racist language. The Report emphasized the refusal of the Chinese to assimilate with white Americans and the threat Chinese laborers posed to white labor, alleging the Chinese would “work for wages which [would] not support white men and especially white families . . . .”<sup>70</sup> Even more emphatically, the Committee expressed its fear for the preservation of republican institutions and white civilization wherever the Chinese settled in large numbers.

[T]he safety of republican institutions requires that the exercise of the franchise shall be only by those who have a love and appreciation for our institutions, and this rule excludes the great mass of the Chinese from the ballot as a necessary means to public safety . . . . An indigestible mass in the community, distinct in language, pagan in religion, *inferior in mental and moral qualities*, . . . is an undesirable element in a republic, but becomes especially so if political power is placed in its hands.<sup>71</sup>

The Chinese, in the view of the committee, threatened the American future of the West coast.

[T]he Pacific coast must in time become either American or Mongolian. There is a vast hive from which Chinese immigrants may swarm, and circumstances may send them in enormous numbers to this country. These two forces, Mongolian and American, are already in active opposition. They do not amalgamate, and all conditions are opposed to any assimilation. The American race is progressive and in favor of a responsible representative government. The Mongolian race seems to have no desire for progress, and to have no conception of representative and free institutions. . . . [T]he Chinese, having no inclination to adopt this country as their permanent home, . . . come and return as pagans, having a total disregard for our Government and laws . . . .<sup>72</sup>

A similar legislative report was published by the Senate of California in August, 1877. Entitled *Chinese Immigration: Its Social, Moral and Political Effect*,<sup>73</sup> it was even more racist in tone than the

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letter contains no such reference. The House Select Committee on Immigration and Naturalization made another report on Chinese Immigration in 1891, making similar allegations and adding new ones. See H.R. REP. NO. 4048 (1891).

70. Kim, *supra* note 15, at 59.

71. S. REP. NO. 689, at v (1877) (emphasis added).

72. *Id.* at v-vi.

73. REP. TO THE CAL. STATE S. OF ITS SPEC. COMM. ON CHINESE IMMIGRATION, CHINESE IMMIGRATION; ITS SOCIAL, MORAL, AND POLITICAL EFFECT (1878), *available at*

Congressional Report. The state report alleged that the Chinese committed perjury freely, and ran their own shadow tribunals, "in open defiance of [our laws, creating] an *imperium in imperio*." It also asserted that "[s]ervile labor to them is their natural and inevitable lot."

[T]here can be no hope that any contact with our people, however long continued, will ever conform them to our institutions, enable them to comprehend or appreciate our form of government, or to assume the duties or discharge the functions of citizens. During their entire settlement in California they have never adapted themselves to our habits, modes of dress, or our educational system, have never learned the sanctity of an oath, never desired to become citizens, or to perform the duties of citizenship, never discovered the difference between right and wrong, never ceased the worship of their idol gods, or advanced a step beyond the musty traditions of their native hive. Impregnable to all the influences of our Anglo-Saxon life, they remain the same stolid Asiatics that have floated on the rivers and slaved in the fields of China for thirty centuries . . . .<sup>74</sup>

If Harlan had access to these reports, it is noteworthy that, unlike the reports, Harlan's letter to James does not argue that the indelible character of the Chinese or their racial inferiority required that they be denied admission to the American community.<sup>75</sup> Instead, Harlan's letter suggests, it is Chinese resistance to American political culture and institutions, their refusal to fully identify with and accept the culture of the United States, rather than their inherent racial characteristics that made Chinese immigration problematic. This may seem a subtle distinction, but it is an important one.

In January 1883, the Supreme Court had not yet heard a case involving the Chinese but one of Harlan's colleagues on the Court already had had substantial experience with the question of Chinese

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<http://pds.lib.harvard.edu/pds/view/4226138?n=3&s=4>. For a discussion of the context of the California Report, see COOLIDGE, *supra* note 14. For a critical analysis of the Report itself, see *Id.* at 83-95. Coolidge notes that the California legislature sent out 10,000 copies of the report to politicians, newspapers, and other influentials. *Id.* at 84. Harlan may have received one of them. The New York Times later reported that Dr. Coolidge had written a book that was so critical of immigration officials and other actors in the Chinese exclusion drama that "Henry Holt & Co., the publishers, [had] withdrawn it from circulation" under pressure from Washington." *Officials Attacked; Book is Withdrawn*, N.Y. TIMES, Oct. 16, 1909.

74. REP. TO THE CAL. STATE S. OF ITS SPEC. COMM. ON CHINESE IMMIGRATION, CHINESE IMMIGRATION; ITS SOCIAL, MORAL, AND POLITICAL EFFECT (1878), *available at* <http://pds.lib.harvard.edu/pds/view/4226138?>

75. Opposition to Chinese immigration was not always grounded in a belief in their racial inferiority. Some opponents "regarded the Chinese as equals. The issue was simply one of who would control California." WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 101 (1988).

immigration. Justice Field, a Californian, had been involved in Democratic politics in the state and his work there as federal circuit judge had immersed him in the “Chinese problem.” In Harlan’s eyes, Field would have seemed an expert on the issues involved. If seeking hurried advice on a Saturday at Court about what arguments and sources to send to James, Harlan might well have spoken with Justice Field. Field’s discussion of the problems caused by Chinese immigration and the “facts” that he offered about the Chinese themselves, only slightly more than a year later in his dissent in *Chew Heong v. United States*,<sup>76</sup> bear a clear resemblance to the “facts” assumed about the Chinese in Harlan’s letter. Field later repeated them in his opinion for the Court in *Chae Chan Ping v. United States*.<sup>77</sup> Field would have been familiar with both the congressional and the state senate reports on Chinese immigration and may have communicated their themes to Harlan. Harlan’s letter seems a somewhat confused echo of these arguments. It reads like he remembered the bullet points, but not the details of what Field had told him about the “facts” surrounding the Chinese question.<sup>78</sup> It is quite possible that Harlan’s letter to James demonstrates not

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76. 112 U.S. 536 (1884). In *Chew Heong*, Field argued that Chinese labor competed unfairly with White labor because the Chinese, without families, were “content with small gains and the simplest fare” and “perfectly satisfied with what would hardly furnish a scanty subsistence to our laborers and artisans.” *Id.* at 566. He went on to observe that:

[N]otwithstanding [the] favorable provisions [of the treaties], opening the whole of our country to them, . . . they have remained among us a separate people, retaining their original peculiarities of dress, manners, habits, and modes of living, which are as marked as their complexion and language. They live by themselves; they constitute a distinct organization with the laws and customs which they brought from China. Our institutions have made no impression on them during the more than 30 years they have been in the country. . . . They do not and will not assimilate with our people . . . . Thoughtful persons who were exempt from race prejudices saw, in the facilities of transportation between [China and the West Coast] the certainty, at no distant day, that from the unnumbered millions on the opposite shores of the Pacific, vast hordes would pour in upon us, overrunning our coast and controlling its institutions. A restriction upon their further immigration was felt to be necessary to prevent the degradation of white labor, and to preserve to ourselves the inestimable benefits of our Christian civilization.

*Id.* at 566-67, 569. In *Chew Heong*, only slightly over a year after Harlan’s letter, Field sets out the “facts” about the Chinese, with far more articulation and vehemence than Harlan did in his letter to James. See Letter, *supra* note 62, but without Harlan’s hoary nativist themes. The parallel is striking. It is also striking that Harlan seems curiously unmoved by Field’s “facts” in *Chew Heong*.

77. 130 U.S. 581, 595 (1889).

78. For the role Justice Field played in the Chinese cases, see McCLAIN, *supra* note 14, and CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 205-239 (Phoenix 1969) (1930). For Field’s privately expressed views on Chinese immigration, see Charles W. McCurdy, *Stephen J. Field and the American Judicial Tradition*, in THE FIELDS AND THE LAW 5, 17 (1986).

prejudice but a lack of knowledge about the subject, and dependence on Field's exposition of the issue. Since the Court was in session, Field and Harlan could easily have had a conversation about Chinese immigration and such a conversation might well have been his source for the arguments he sent James.

The substance of the letter is a peculiar blend of Field's "facts" filtered through Harlan's own nativist concerns about immigration in general.<sup>79</sup> Harlan began with the metaphor of the family. One owed a greater duty to one's household than to strangers. He then went on to describe why the Chinese were strangers: they were of a different race and culture. The reference to the Chinese as another race "as distinct from ours as ours is from the negro" was a comment on "foreign-ness" not inferiority. His hypothetical about "a tide setting in here from America [sic] [Africa] of uneducated African savages" expresses the same fear. For Harlan, the champion of Black American citizenship and equal rights, a "tide" of any people whose arrival might swamp what was distinctively American, elicited a nativist response.

Harlan suggested that James offer a standard for immigration decisions, a criterion for when the stranger should be admitted to the household, the immigrant to the country. Harlan suggested that James argue that decisions concerning immigration should be resolved in reference to what was good for the United States, rather than what was good for the immigrant. This idea was uncontroversial in the 1880s and remains among the important criteria upon which immigration policy is based today.

Briefly, in the mid-1850s, Harlan had been a member of the nativist, anti-Catholic, American Party. That Party was the political expression of the "Know-Nothing" movement and appealed to conservative Protestants like Harlan trapped geographically between the North and South in the sections' great argument over slavery.<sup>80</sup> Later, Harlan seems to have rejected the explicitly anti-Catholic sentiments of the Party and, near the end of his life, wrote that he regretted he had ever

79. See *supra* text accompanying notes 61-65.

80. Initiates of the secret "Order of the Star-Spangled Banner," were known publicly as the Know-Nothings because when asked about the secret society they responded: "I know nothing about it." Members swore to vote only for native-born Americans, were "in favor of Americans ruling America", and against any Catholic. DARRELL OVERDYKE, *THE KNOW-NOTHING PARTY IN THE SOUTH* 34, 40 (1950); see also TYLER ANBINDER, *NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850S* (1992). For more detail on the religious elements of Harlan's nativism, see Gordon, *supra* note 12, at 353-358, 391-395. For recent scholarship on nativism, see ANBINDER, *supra* note 30, at 177-201.



been part of that group.<sup>81</sup> Still, in 1889, he persisted in the belief that the Democratic Party “pandered to and courted foreign influence, in order to get the votes of foreigners.”<sup>82</sup> While claiming to welcome “honest, industrious, immigrants who desire to enjoy the blessings of our institutions, and who assimilate with our people,” Harlan argued that too many who came here were “worthless characters,” criminals, and those “gathered from the highways and byways of other countries.”<sup>83</sup> These immigrants threatened the United States because they “have little sympathy with or knowledge of our institutions.”<sup>84</sup> He apparently continued to fear that “the safety of our Government and the integrity of our civilization [are] . . . menaced by the presence here of so many who . . . have little sympathy with or knowledge of our institutions.”<sup>85</sup>

Harlan returned to these themes in 1898. Too many people were admitted to citizenship “who have not the slightest idea about our institutions, who scarcely know our language, whose habits have been formed up and past [sic] manhood in other lands, under other systems of government, and who never do understand our civilization as we understand it.”<sup>86</sup> The debate letter suggests these themes and so may reflect Harlan’s general ideas about immigration. It is noteworthy that Harlan seems never, publicly, to have connected his immigration ideas to the race of the immigrants. There is nothing, therefore, to suggest that his animus, if it existed, was the result of race prejudice particularly directed at the Chinese.<sup>87</sup>

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81. John Marshall Harlan, *The Know-Nothing Organization*, in HARLAN PAPERS, LC, *supra* note 3, at reel 8, frame 377. Harlan’s anxieties about the Chinese, if he had them, might have been reinforced by his dedication to the Union and his experiences during the sectional crisis of the 1850s and the Civil War. If people with no loyalty to the Union became dominant in a geographic section of the country, might they not become a centrifugal force, at some future time, threatening the integrity of the Union? The experience of Mexico whose citizens had originally settled Texas, the American southwest, and California, only to be overwhelmed by Anglo immigrants from the United States, was a warning against welcoming an “unassimilable” mass to a particular geographic area. Harlan apparently harbored such fears about the Mormons. See Gordon, *supra* note 12, at 402-18.

82. John Marshall Harlan, Speech delivered in Chicago (1889), quoted in *A General Celebration*, N.Y. TIMES, May 1, 1889.

83. *Id.*

84. *Id.*

85. *Id.*

86. Harlan, Law Lectures (Jan. 8, 1898), in HARLAN PAPERS, LC, *supra* note 3, at 13, reel 8, frame 509.

87. The only public speech of which I am aware in which Harlan made reference to race in relation to Asians was a speech he gave to the Navy League banquet in Washington, D.C. on January 11, 1908. No text of this speech survives but in it, as reported by the Washington Post and New York Times, Harlan supported large expenditures for the navy and warned of a future collision with Japan. *Harlan Warns of War*, WASH. POST, Jan. 11, 1908. In this

There is no doubt that Harlan esteemed American culture and preferred it to the competing cultures that immigrants, whatever their race, brought with them to the United States. Ironically, Harlan believed in the defense of American culture in the name of equality, not in opposition to it.<sup>88</sup> Harlan favored immigration restriction in order to preserve America's *political culture*, not its *racial purity*. He applied this same standard to immigration by Europeans. In this respect, when Harlan asserted in his letter to James that "[o]nly Americans, or those who become such, by long stay her, understand American institutions," he was really only saying what his membership in the American ("Know-Nothing") Party had already said in the late 1850s. That short-lived party's watchword had been "[p]ut none but Americans (native-

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speech, as reported, Harlan predicted a possible future war with Japan, perhaps triggered by conflict over China.

Just across the water there is a country with an immense population, whose commerce we are seeking [China]. We refer to the people of Asia as the yellow race. There are 400,000,000 Chinese, as strong physically and mentally as we are. [Japan's] people are progressive and ambitious. We may some day see a skilled army in Japan of from 5,000,000 to 10,000,000. . . . [Japan may someday say] '[t]his [China] is ours. Get out!' I don't think they have any such idea now, and we have no hostility toward them. But there will be a conflict between the yellow race and the white race that will shake the earth. When it comes I want to see this country with a navy on both oceans that will be strong enough.

*Harlan Prophecies a Great Race War*, N.Y. TIMES, Jan. 12, 1908. With the annexation of Hawaii and the acquisition of the Philippines and Guam from Spain in 1898, the United States became a power in the central and western Pacific. The stunning Japanese victory over Russia in the Russo-Japanese War of 1904-05 had demonstrated both Japan's capability and desire to project power in the western Pacific. Given China's weakness and its proximity to Japan, it was natural for Japan to think of China as within its sphere of influence and, eventually, to seek to exclude other powers which had commercial footholds there. One did not have to be a prophet to foresee a future collision between American and Japanese interests that might trigger a war. In fact, when the war came in 1941, it was partly triggered by Japanese occupation of China. It is noteworthy that, in his speech, Harlan neither expressed nor implied a belief in Asian inferiority. Instead, he saw the Japanese as dangerous competitors. At the time of this speech, there were many sources of friction between the United States and Japan. At the very time Harlan spoke to the Navy League, the country was on edge with widespread anxiety about a Pacific war. In late 1907, President Roosevelt ordered America's battleships into the Pacific, partly to pressure Japan into resolving the countries' differences diplomatically. See EDMUND MORRIS, *THEODORE REX* 482-85, 492-95, 534 (2001). In December and January, 1907-08, the newspapers ran a number of stories about the threat of war between the U.S. and Japan. See e.g., *A Stronghold Needed in the Philippines*, N.Y. TIMES, Jan. 12, 1908 (Magazine), at 2-3; *Paris Thinks It War Move.; Compares Our Fleet with Japan's — In Japan's Favor*, N.Y. TIMES, Dec. 22, 1907; *War Talk In Paris. — Suggested Japan Asks Agreement with US Before Fleet Reaches Pacific*, N.Y. TIMES, Jan. 3, 1908. The day after Harlan's speech, the New York Times reported that the newly appointed Japanese ambassador to the United States, Baron Kogoro Takahira, was hurrying to the United States for talks. N.Y. TIMES, Jan. 12, 1908. By November, 1908, all matters were adjusted (temporarily) in the Root-Takahira Agreement.

88. PRZYBYSEWSKI, *supra* note 10, at 122.

born Protestants) on Guard.”<sup>89</sup>

In this context, the most damning words of Harlan’s letter cease to be an attack on the Chinese as a race and restate Harlan’s general aversion to unskilled immigrants, who undermined American political and cultural homogeneity.<sup>90</sup> These old familiar nativist themes, which Harlan also expressed in other contexts and at other venues, were not really about race at all.<sup>91</sup> But, once immigrants entered the country, defense of American culture and institutions, as he understood them, required Harlan to insist that these same immigrants receive the constitutional guarantees of life, liberty, and property belonging to all persons within the jurisdiction of the United States.<sup>92</sup>

Even if one reads all of this differently, one thing is clear from the letter itself and that is that the Chinese, like every other immigrant and racial group for Harlan, were entitled to the full rights of citizenship, including suffrage, once they ceased to be sojourners and joined their destiny to that of the country. If forced to choose between fidelity to the principle of constitutional republicanism, with its corollary of equality before the law for all members of the community, and creating classes of citizenship, Harlan remained committed to equality. He may not have liked the prospect, but still he wrote: “If they come *we must admit them*

89. John Marshall Harlan, Memorandum on the Know Nothing Party in Kentucky, in HARLAN PAPERS, LC, *supra* note 3, at reel 8, frame 377.

90. These immigrants undermined American Protestant culture by their perceived affinity for alcohol and the saloon, for the strange and dangerous political ideas some of them brought (like anarchism and socialism), and by their rejection of the Protestant Sabbath. See Gordon, *supra* note 12, at 346, 350-53.

91. That Harlan would have rejected the racist element in the argument is suggested by his dissent in *Berea College v. Kentucky*, 211 U.S. 45 (1908). In the *Berea College* case, the Kentucky Court of Appeals sustained a state segregation statute enacted for the specific purpose of preventing Berea College from continuing its policy of teaching Black and whites students together at an integrated, coeducational, private college. In its opinion, the Kentucky court set out in great detail the racial ideas then current in much of the South and among those who might be labeled “racial Darwinists.” *Berea College v. Commonwealth*, 94 S.W. 623 (Ky 1906). On review by the United States Supreme Court, the majority sustained the state court ruling, without addressing the state court’s “racial Darwinist” arguments. In his dissent, Harlan rejected the reasoning of the court below when he wrote:

Have we become so inoculated with prejudice of race than an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes, simply because of their respective races?

*Berea College*, 211 U.S. at 69 (Harlan, J., dissenting).

92. See *Downes v. Bidwell*, 182 U.S. 244, 375 (1904) (Harlan, J., dissenting); *Dorr v. United States*, 195 U.S. 138, 154 (1904) (Harlan, J., dissenting); *Hawaii v. Mankichi*, 190 U.S. 197, 226 (1903) (Harlan, J., dissenting); *Baldwin v. Franks*, 120 U.S. 678, 694 (1887) (Harlan, J., dissenting).

to citizenship, then to suffrage." Even given Harlan's nativist history and concerns, it is still clear that Harlan's commitment to equality for all Americans, once here, was fundamental.<sup>93</sup>

For Harlan, there could never again be a class of persons in the United States, as Chief Justice Taney had asserted in *Dred Scott*, with only such rights as the dominant race chose to give them. That was part of the curse of slavery and that monster had been slain. It is possible that Harlan's first choice was limitation of Chinese immigration, but it is important to acknowledge that he assumed that equal treatment must accompany admission. Later, when the *Insular Cases* presented this question, Harlan cast his vote repeatedly for this position and wrote powerful dissents making his meaning perfectly clear.<sup>94</sup>

### III. THE CHINESE CASES

#### A. *A Framework for the Cases*

Thirty-seven cases involving the rights of Asians in the United States came to the Supreme Court during Harlan's tenure. They fell into five broad categories. The first category asked whether Congress could forbid Chinese immigration to the United States.<sup>95</sup> These cases required the Court to define the scope of Congress' power over immigration. The second category involved the application of the Exclusion regime to those Chinese who sought readmission to the United States, after traveling abroad, claiming to have been resident in this country before the effective date of the Exclusion Acts.<sup>96</sup> Connected with this set of cases were two subsidiary questions asking whether Congress could delegate authority to administrative officials to make the factual determinations involved when they applied the Exclusion regime to individual cases and, if it could, whether Congress could deny the federal courts the power to review these determinations.<sup>97</sup> The third category of cases asked whether the Fourteenth Amendment Equal

93. Even the exclusion regime was temporary, Harlan suggested. It would provide "the opportunity to test the question whether it is safe to . . . permit unrestricted immigration." He wrote, "[t]he Chinese here will, in that time, show of what stuff they are made." Letter, HARLAN PAPERS, LC, *supra* note 3, reel 1, frame 296-98 (the entire text of this letter is set out *supra* note 61).

94. *See infra* Part IV.

95. *E.g.*, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *see also* *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

96. *E.g.*, *Chew Heong v. United States*, 112 U.S. 536 (1884).

97. *E.g.*, *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *see also* *Yamataya v. Fisher*, 189 U.S. 86 (1903).

Protection Clause protected resident non-citizens against discriminatory state and local laws or laws, which, though neutral on their face, were administered in a discriminatory manner.<sup>98</sup> The fourth category of cases asked whether federal civil rights statutes protected resident non-citizens in their persons and property from the violent acts of their neighbors.<sup>99</sup>

A fifth question that arose but was only presented to the Court on one occasion asked whether the Fourteenth Amendment bestowed citizenship on children born in the United States to resident non-citizen Chinese parents who themselves could not become citizens.<sup>100</sup>

Twenty-eight of the thirty-seven cases involved immigration. Harlan participated in twenty-seven of these and wrote opinions in five of them: four for the Court and one in dissent.<sup>101</sup> One striking fact about the cases is that Harlan wrote few of the opinions. This means that the revisionist critique relies heavily on assigning meaning to his naked votes in the face of his silence.<sup>102</sup>

#### B. *Harlan and the Chinese Immigration Cases*

The Court decided the first case involving the Chinese Exclusion Acts in December, 1884.<sup>103</sup> Chew Heong, a Chinese laborer, had entered the United States and become a resident under the provisions of the Burlingame Treaty of 1868 before passage of the Exclusion Acts. He left the United States in 1881, lived in Hawaii until 1884, and then sought to return to California. He was denied entry under the 1882 and

98. *E.g.*, *Barbier v. Connolly*, 113 U.S. 27 (1884); *Soon Hing v. Crowley*, 113 U.S. 703 (1885); *see also* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

99. *E.g.*, *Baldwin v. Franks*, 120 U.S. 678 (1887).

100. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

101. Harlan's opinions for the Court were: *Yamataya v. Fisher*, 189 U.S. 86 (1903); *United States v. Lee Yen Tai*, 185 U.S. 213 (1902); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895); and *Chew Heong v. United States*, 112 U.S. 536 (1884). The dissent was *Jung Ah Lung v. United States*, 124 U.S. 621 (1888).

102. This is sometimes unavoidable but when one does this, he or she should remember he or she is staring into the darkness, guessing at what is out there. Even when a judge writes an appellate opinion, the offered rationale likely reflects negotiation and compromise rather than one judge's unalloyed views. Alternatively, the opinion may offer nothing more than that judge's explanation of why he or she feels compelled, perhaps even against his or her private preferences, to a result required by law. Once a principle of law is settled, *stare decisis* urges the judge to apply that rule to other similar cases. The problem is even more complicated when one judge joins in another's opinion. Joining an opinion may indicate complete agreement. It may mean there was insufficient disagreement to warrant a separate, written expression of that disagreement. It may mean that the judge is distracted by other work or has joined an opinion for tactical reasons, so as to have the opportunity to shape how "bad" the ultimate published rationale becomes. One should be cautious in drawing conclusions from silence about a particular judge's beliefs.

103. *Chew Heong*, 112 U.S. 536 (1884).

1884 Exclusion Acts because he could not produce the certificate for re-entry required by the Exclusion Acts.<sup>104</sup> Harlan, writing for the majority of a divided court, ordered that Chew Heong be allowed to re-enter the country. Justice Field, who had sat as a circuit judge in the case and had rejected Chew Heong's petition below, dissented.<sup>105</sup>

Borrowing heavily from Judge Sawyer's dissent in the circuit court, Harlan attempted to reconcile the pre-existing treaty rights of the Chinese with the Exclusion Acts of 1882 and 1884. Harlan rejected the government's argument that the Exclusion Acts abrogated the treaty by inconsistency. While acknowledging that Congress could abrogate a treaty by subsequently enacting a statute that was inconsistent with it, Harlan argued that since the Exclusion Acts had declared Congress' intent to execute the treaty rather than to revoke it, the rule of construction that applied dictated that repeals by implication are disfavored. Therefore, the Court should attempt to reconcile the statutes and the treaty if possible.<sup>106</sup> By so construing congressional intent, Harlan upheld Chinese treaty rights while preserving the principle of judicial deference for congressional authority.

Harlan argued further that Congress could not have intended the re-entry of Chinese laborers, resident in the United States before passage of the statutes but abroad when the Exclusion Acts were passed, to depend on a condition that it was impossible for them to satisfy. Since the statutes requiring the certificate for re-entry were passed after Chew Heong left the country, it was impossible for him to comply with a requirement that did not exist when he left.<sup>107</sup> Harlan's "impossibility"

104. The facts were stipulated and so the case presented the question of the legal application of the Exclusion Acts without raising issues related to fact-finding.

105. Justice Field had written a short opinion below, despite a long and well-reasoned dissent by his circuit court colleague Judge Lorenzo Sawyer arguing that the Exclusion Act certificate requirement did not apply to Chew Heong. See *In re Cheen Heong*, 21 F. 791 (C.C.D. Cal. 1884).

106. *Chew Heong*, 112 U.S. at 549-50.

107. *Id.* at 554-55. Judge Sawyer had relied heavily on this proposition and by parsing the statute carefully, offered Harlan a way to reconcile this reading with the literal language of the text. Harlan also used Sawyer's argument that since the re-entry certificates required by the 1882 and 1884 Acts differed in their requirements, retroactive application of the 1884 Act's provision making "this certificate" (the one prescribed in the 1884 statute) the only acceptable proof of prior residence would have the effect of excluding persons seeking re-entry with an 1882 certificate. *In re Cheen Heong*, 21 F. at 804-06 (Sawyer, J., dissenting). Harlan and the majority in *Chew Heong* may also have given weight to Sawyer's final argument. Near the end of his opinion, Judge Sawyer wrote:

The construction I have given to this law not only reconciles the legislation with the observance of the plighted faith of the nation, but it carries out and effectuates the object of the treaty and the law. The evil to be remedied was the continued, unrestricted immigration of Chinese laborers. It was recognized that rights of those

theory further limited the reach of the statutes and would be used by the Court in future Chinese cases to prevent the exclusion of other Chinese petitioners.<sup>108</sup> Finally, Harlan rejected the argument that the language of the 1884 Act, which made the certificate “the only evidence permissible” to establish a Chinese resident’s right to re-enter the United States, should be applied retroactively to Chinese who were abroad before passage of the act. Although conceding that Congress could give retroactive effect to a statute of this kind, Harlan argued that this should occur only when Congress used “language so clear and positive as to leave no room for doubt that such was the intention . . . .”<sup>109</sup> This principle restricted the reach of the Exclusion Acts and made it possible for Chinese laborers like Chew Heong, who would otherwise have been excluded, to re-enter the country. Harlan tried to restrict application of the Exclusion Statutes to those situations to which Congress reasonably had intended them to apply, but he also made it clear that, if Congress expressed in unequivocal language its intention to exclude the Chinese, he would defer to congressional power. Thus, Harlan insisted that Chinese rights, established by treaty, be taken seriously while acknowledging the broad scope of congressional power over immigration.

The substance of Justice Field’s dissent makes it clear that Harlan and the Court could have taken a different path. In Field’s view, Harlan’s reading of the Exclusion Acts, permitting any Chinese laborer who had ever been resident in the United States before passage of the Exclusion Acts (including those who had abandoned their American

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who were already here were secured by the Burlingame treaty and international law. . . . [T]he legislation was directed solely against any further addition to the numbers of the Chinese then here . . . . This object, the law in its practical operation, has been attained. Not only has there been no accession to the number of Chinese in this country, but the statistics of the custom-house show that, during the 28 months which have elapsed since the passage, the number of departures exceed the number of arrivals by 12,000.

*Id.* at 807-08. On this basis, Harlan might have reconciled his nativist fear that American culture and institutions on the West Coast would be swamped by an unlimited “tide” of Chinese immigrants, with his desire for neutrality on matters involving race-based distinctions.

108. *Chew Heong*, 112 U.S. at 549. Chief Justice Fuller would later use this language to justify common sense exceptions to the Act in favor of some Chinese merchants. The Court held that Chinese merchants, who resided in the United States and complied with the Treasury Department regulations before leaving for visits to China, must be allowed to return to the United States. *See Lau Ow Bew v. United States*, 144 U.S. 47, 62 (1892). Justice Brewer also used Harlan’s opinion in *Chew Heong* to a similar purpose in *United States v. Gue Lim*, 176 U.S. 459, 465 (1900).

109. *Chew Heong*, 112 U.S. at 559.

residence) to return, was tantamount to nullifying the statutes.<sup>110</sup> After a screed against Chinese immigration,<sup>111</sup> Field gave reasons why the United States was free, without dishonor, to abrogate the Burlingame Treaty.<sup>112</sup> He reported that the courts of the Pacific coast, under the 1882 Act, had been choked with cases in which Chinese laborers evaded enforcement of the Exclusion Act by producing Chinese witnesses who would swear, falsely, that the petitioner had been resident in the country before passage of the 1882 Act. Quoting from the House committee report on the 1884 Act, Field stated that Congress had made the certificate the only permissible evidence of a Chinese laborer's right to re-enter the country in order to prevent this. By this provision, Field argued, "the door is effectually closed, or would be closed but for the decision of the court in this case, to all parol evidence, and the perjuries which have heretofore characterized its reception."<sup>113</sup> In light of the majority's decision in *Chew Heong*, Field predicted that:

[O]ur courts there will be crowded with applicants to land, who never before saw our shores, and yet will produce a multitude of witnesses to establish their former residence . . . . I can only express the hope, in view of the difficulty, if not impossibility, of enforcing the exclusion of Chinese laborers intended by the act, if parol testimony from them is receivable, that congress will, . . . speak on the subject in terms which will admit of no doubt as to their meaning.<sup>114</sup>

Rejecting Harlan's "impossibility" principle, Field argued, Congress had intentionally excluded any Chinese laborer who had, in fact, been resident in the United States before the 1882 Act, in order to keep out those who, though never resident in the United States, would

110. *Id.* at 561-62, 572 (Field, J., dissenting).

111. *Id.* at 565-69.

112. *Id.* at 570.

113. *Id.* at 577-78.

114. *Id.* at 578-79. In *Chae Chan Ping*, Field would repeat the allegation that the Chinese Exclusion Acts were amended to require evidence of prior residence other than the testimony of Chinese witnesses because of the common belief that the Chinese would readily perjure themselves. He suggested that the Chinese had "loose notions . . . of the obligation of an oath." *Chae Chan Ping v. United States*, 130 U.S. 591, 598 (1889). Justice Gray would return to this theme in *Fong Yue Ting* to justify the requirement of the Geary Act that proof of prior residence must be by at least one white witness. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893). In his dissent in *Quock Ting v. United States*, 140 U.S. 417 (1891), Justice Brewer explicitly rejected this idea, writing: "The government evidently rested on the assumption that because the witnesses were Chinese persons they were not to be believed. I do not agree with this." *Id.* at 422 (Brewer, J., dissenting).



falsely claim they had been in order to gain entry.<sup>115</sup> This decision, he believed, was within the power of Congress and he argued that the courts had no authority to overturn it.<sup>116</sup>

Having conceded that Congress could abrogate a treaty by legislation, all Harlan would have had to do in order to join Field and slam the door on such claims was to hold that Congress had intended, as Field so passionately argued, to abrogate the treaty and apply the certificate requirement retroactively. By choosing otherwise, Harlan made it possible for many Chinese who would otherwise have been excluded, to enter the United States. This was a strangely pro-Chinese beginning for a man alleged to have a particular racial animus toward them.

In 1888, when a case involving Chinese exclusion next came to the Court, Harlan dissented. The case was *Jung Ah Lung v. United States*.<sup>117</sup> A Chinese laborer, resident in the country before passage of the Exclusion Acts, had complied with these acts by obtaining the requisite certificate before leaving, in 1883, for a trip to China.<sup>118</sup> In 1885, upon return to the United States, he was denied re-entry because he could not produce the certificate. The petitioner claimed the certificate was stolen from him by pirates but the customs officials refused him admission on the ground that the 1884 Act made the certificate the *only* admissible evidence of his right to return.<sup>119</sup>

Closely parsing the language of the 1882 Act, Justice Blatchford, writing for the majority, held that the 1882 Act, (which applied to Jung Ah Lung because he had left the country before passage of the 1884 Act), did not make the certificate the sole evidence of his right to re-enter when the petitioner sought re-entry by sea. In reaching this result, the Court held that Congress had intended to make the certificate the sole evidence permissible when entry was by land but only evidence of the petitioner's identity when he sought re-entry by sea. This reading was grounded on a difference in language between section 4 (applying to those returning by sea) and section 12 (applying to those returning by land). Section 12 said: "[N]o Chinese person shall be permitted to enter the United States by land without producing to the proper officer of

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115. *Quock Ting*, 140 U.S. at 148.

116. Justice Bradley also dissented, agreeing that Congress had intended to allow re-entry only upon production of a certificate of identification. *Chew Heong*, 112 U.S. at 578-80 (Bradley, J., dissenting).

117. 124 U.S. 621 (1888).

118. *Id.* at 624.

119. *Id.*

customs the certificate in this act required of Chinese persons seeking to land from a vessel.”<sup>120</sup> Section 4 said: “The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States, upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re-enter.”<sup>121</sup> Justice Blatchford argued this language

merely says that [the certificate] . . . shall be given for the purpose of properly identifying the laborer, and shall be proper evidence of his right to . . . re-enter the United States . . . . It does not say that the Chinese laborer returning by a vessel shall not be permitted to enter . . . without producing the certificate.<sup>122</sup>

This reasoning was too disingenuous for Harlan. In his dissent he argued that the Court had ignored the language of section 3, which exempted laborers who were resident in the country before passage of the 1882 Act or who arrived within 90 days thereafter

*and who shall produce to such master before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, the evidence hereinafter in this act required of his being one of the laborers in this section mentioned.*<sup>123</sup>

Section 4 said:

The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States *upon producing and delivering the same* to the collector of customs of the district at which such Chinese laborer shall seek to re-enter, and, upon delivery of such certificate by such Chinese laborer to the collector of customs at the time of re-entry into the United States, said collector shall cause the same to be filed in the custom-house, and duly canceled.<sup>124</sup>

Harlan stated he could reach no other conclusion from the language than that Congress had intended “to prohibit the return to this country of

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120. *Id.* at 632.

121. *Id.* at 634.

122. *Id.* at 634-35. The United States also contended that Congress had provided that customs officials were to determine whether the petitioner could re-enter the United States and that this decision was not subject to court review. The majority rejected this argument as well, though it would embrace it three years later in *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1891).

123. *Jung Ah Lung*, 124 U.S. at 636 (Harlan, J., dissenting) (emphasis added).

124. *Id.* at 637 (emphasis added) (quoting Act of May 6, 1882, ch. 126, §§ 1-15, 22 Stat. 58, 58-61).

any Chinese laborer . . . who thereafter left the United States [after the prescribed dates] taking with him the certificate prescribed by . . . [the 1882 Exclusion Act], unless he produced such certificate at the time he sought to re-enter.”<sup>125</sup>

He saw no reason to suggest that Congress intended to treat Chinese re-entering the country by sea differently from those entering by land. He dismissed the majority’s suggestion that the presence of the customs registry books kept at the port from which a Chinese resident departed justified the distinction. Harlan noted that the petitioner could return to any port in the country under the Act and that the collector of customs at the port of entry “would have been without authority to accept affidavits in support of his [the Chinese petitioner’s] right to re-enter.”<sup>126</sup> Finally, Harlan observed that the 1884 Amendments to section 4 made clear Congress’ intent that “said certificate shall be the only evidence permissible to establish his right of re-entry.”<sup>127</sup> Harlan argued “[t]his did not declare a new rule, but indicates, in language clearer than that previously used, the intention of congress in passing the act of 1882.”<sup>128</sup>

Although working a terrible hardship on Jung Ah Lung personally, Harlan’s reading of the statute seems truer to the principle that courts should seek to interpret statutes according to their language and legislative intent than does that of the majority. The distinction the majority purported to find in the language of the statute seems like a pretext for achieving a desired outcome. The majority position seems to be an example of a court offering a distorted reading of a statute for the purpose of doing justice in a particular case. The majority may have been more willing to do this than in most cases because the 1884 amendment, expressly limiting proof of the right to re-enter by sea to production of the certificate, meant the *Jung Ah Lung* decision would have almost no effect on anyone but the petitioner in that case.

Harlan’s opinion ends with what, at first blush, seems a cruel and uncaring comment. “If appellee’s certificate was forcibly taken from him by a band of pirates, while he was absent, that is his misfortune.” But this was not his point. He continued: “That fact *ought not to defeat what was manifestly the intention of the legislative branch of the government.*”<sup>129</sup> It is this second sentence rather than the first that

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125. *Id.* at 637-38.

126. *Id.* at 638.

127. *Id.* (quoting the Act of July 5, 1889, 23 St. 115).

128. *Id.* at 639.

129. *Id.* (emphasis added). By the time *Jung Ah Lung* was decided in February, 1888, it must have been general knowledge in official Washington that the United States had been in

deserves emphasis. Although aware of the injustice that his reading of the statute would work, he still insisted that the Court should not rewrite the statute for the sake of a result in a particular case. Changes, if they were to be made, should be made by the legislative branch not by the Court. In his *Jung Ah Lung* dissent, Harlan deferred to what he believed to be the clearly expressed intent of Congress. This is what he had said, in *Chew Heong*, he would do when Congress made its intention clear. Harlan's deference for legislative intent and his posture of judicial restraint were characteristic of Harlan across a whole spectrum of cases and of legal issues.<sup>130</sup> These themes were central threads in Harlan's judicial philosophy. That he felt strongly enough about these principles to write a dissent in *Jung Ah Lung* tells us nothing about Harlan's personal views on Chinese exclusion.

It was not until 1889, in the case of *Chae Chan Ping v. United States*,<sup>131</sup> that congressional power to enact the Exclusion regime was challenged directly. In this unanimous decision, which Harlan silently joined, the Court held that Congress had plenary power over immigration and that policy decisions of the political branches, in this area, must be respected by the courts. This result can be explained best, not as an expression of anti-Chinese sentiment, but, as one scholar described it, as an application of "classic notions of national sovereignty."<sup>132</sup>

*Chae Chan Ping* came to the Court after the enactment of the Scott Act of 1888 and tested its constitutionality.<sup>133</sup> It was in this case that the Court first articulated Congress' "plenary power" over immigration. This idea would have appealed to Harlan as a proponent of expansive national power and restriction of state power over immigration, without regard to his personal attitude toward the Chinese.

Chae Chan Ping, a Chinese laborer who had been domiciled in San Francisco for twelve years, returned to China on a three-month visit after obtaining a certificate that, under the 1882 and 1884 Chinese Exclusion

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negotiations for almost two years with China for a treaty to prevent Chinese immigration and to forbid the return to the United States of Chinese laborers traveling abroad. Harlan may well have been aware of the sentiment in Congress in favor of taking unilateral action against the Chinese in the event that the treaty was not approved and that may have helped to determine his position in the case. MCCLAIN, *supra* note 14, at 192-93.

130. See e.g., *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 82 (1911) (Harlan, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 66 (1905) (Harlan, J., dissenting), *overruled in part by* *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *United States v. E.C. Knight*, 156 U.S. 1, 18 (1895) (Harlan, J., dissenting).

131. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

132. MCCLAIN, *supra* note 14, at 281.

133. MCCLAIN, *supra* note 14, at 193-94.

Acts, would permit him to re-enter the United States on his return. However, during his absence, Congress passed the Scott Act of 1888, which forbade the return of Chinese laborers to the United States even if they had a certificate under the earlier acts. When Chae Chan Ping returned to California, the collector of the port denied him permission to land. Held by the captain of the ship for return to China, he sought a writ of habeas corpus. The petitioner attacked the 1888 Act as an expulsion of Chinese laborers from the country in violation of the 1880 Sino-American treaty and the 1882 and 1884 Exclusion Acts, arguing it was an attack on property rights vested in these laborers under the prior law.

Writing for a unanimous court and reiterating Harlan's position in *Chew Heong*, Justice Field held that Congress had the power to abrogate or modify a treaty by ordinary legislation and that the decision to do so was exclusively within the discretion of the political branches.<sup>134</sup> He held further that such decisions were not subject to judicial review.<sup>135</sup> Holding that control over immigration was an attribute of national sovereignty, he concluded that the political branches had exclusive control over the subject.<sup>136</sup> These were momentous premises because, once conceded, they greatly restricted the scope of judicial power in future cases involving Chinese immigration.<sup>137</sup> In response to the petitioner's argument that the new statute destroyed a vested property right to re-enter the country, Field compared the right to a license, which was revocable at the will of the sovereign because the power to exclude any alien at will is an essential attribute of sovereignty that could not be restricted.<sup>138</sup> Given Harlan's views supporting national power (that it

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134. *Chae Chan Ping*, 130 U.S. at 600-01. Justice Field rehearsed many of the arguments he would later include in his opinion in *Chae Chan Ping*, while on Circuit in California in 1883. See *In re Ah Lung*, 18 F. 28 (C.C.D. Cal. 1883). Justice Field, speaking for a unanimous Court had earlier held that statutes passed by Congress, which were inconsistent with a treaty, were controlling. *Whitney v. Robertson*, 124 U.S. 190 (1888).

135. *Chae Chan Ping*, 130 U.S. at 602.

136. *Id.* at 603-04.

137. For an appreciation of the baleful influence of *Chae Chan Ping* and *Fong Yue Ting* (the other seminal immigration plenary power doctrine case) and for a powerful argument in favor of its reconsideration, see Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998). See also Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 854, 863 (1987); Janel Thamkul, Comment, *The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 CALIF. L. REV. 553 (2008).

138. *Chae Chan Ping*, 130 U.S. at 609. "The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them,

should be read expansively) and on judicial role (that judges should act with restraint and defer to the political branches), it is not surprising that he would silently join the opinion. Thereafter, *Chae Chan Ping* would control his future votes in cases involving Chinese immigration.

In his opinion, Field, the Californian and the Justice with the greatest first-hand experience on the Chinese question, repeated many of the allegations set out earlier by the California state senate Special Committee on Chinese Immigration and in the report of the congressional Joint Special Committee to Investigate Chinese Immigration.<sup>139</sup> He described as "well-founded" the fears of Pacific Coast White Americans that their "civilization" could be swamped by massive immigration from China.<sup>140</sup> He suggested that the social tensions created by economic competition between Whites and Chinese immigrants were exacerbated by racial differences.<sup>141</sup> He also emphasized, again, as he had earlier in his dissent in *Chew Heong*,<sup>142</sup> the alien-ness of the Chinese and their refusal to assimilate.

[T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them . . . .<sup>143</sup>

Finally, Field analogized Chinese immigration to "foreign aggression and encroachment" and argued that whether these effects come from the policy of another nation or as a result of "vast hordes of its people crowding in upon us" makes no difference. The nation must have the power to protect itself.<sup>144</sup>

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are such as are connected with and lie in property capable of sale and transfer, or other disposition, not such as are personal and untransferable in their character." *Id.*

139. See *supra* text accompanying notes 70-75.

140. *Chae Chan Ping*, 130 U.S. at 594.

141. *Id.* at 595.

142. See *supra* Part III.B.

143. *Chae Chan Ping*, 130 U.S. at 595.

144. *Id.* at 606. Field's record on the Chinese was more mixed than this opinion suggests. His early opinions on the California Supreme Court seemed to favor the Chinese; so much so that they generated anger against him and affected his political prospects. Some of his opinions on Circuit after his appointment to the Supreme Court also seemed to favor the Chinese. See, e.g., *In re Ah Sing*, 13 F. 286 (C.C.D. Cal. 1882); *In re Ah Tie*, 13 F. 291 (C.C.D. Cal. 1882); *In re Low Yam Chow*, 13 F. 605 (C.C.D. Cal. 1882); *In re Tiburcio*

But, none of these “facts” were necessary to the Court’s reasoning or holding and, although one might wish that Harlan had challenged Field’s “facts,” merely joining in the opinion did not mean Harlan embraced them.<sup>145</sup> Given the purpose of dissenting opinions (to call into question the majority’s legal reasoning or conclusions), it seems unfair to condemn Harlan for failing to write a dissent challenging not Field’s legal reasoning or his legal conclusions (with which Harlan agreed), but Field’s “facts” about the Chinese recited in *Chae Chan Ping*. Field presented these “facts” as context and justification for what Congress had done, not because they were constitutive to the legal conclusions in the case. Harlan could challenge the “received wisdom” about Black Americans because his understanding was shaped by direct personal experience with Blacks; he had a personal baseline against which to compare popular beliefs. It seems almost unnecessary to observe that he had no similar personal resource to draw upon when he encountered stereotypes about the Chinese.

Of course, it could be argued that Harlan should have challenged Field’s “facts” because their predicate was so clearly racism. But, even with the evidence of his dissents in cases involving Black Americans, no one claims that Harlan had our twenty-first century sensitivity to racism. He was a late nineteenth century American and, like his contemporaries, he breathed an atmosphere infused with such racist ideas. In fairness, one must consider the extent to which the criticism of Harlan in regard to the Chinese cases ultimately rests upon the allegation that, though he had begun, he had not finished integrating fully our modern understanding of race. This ignores the fact that he lived not in our time, but in his own.

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Parrott, 1 F. 481 (C.C.D. Cal. 1880); *In re Ah Fong*, 1 F. Cas. 213 (C.C.D. Cal. 1874); *Ho An Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879); *see also* *Baldwin v. Franks*, 120 U.S. 678, 701 (1887) (Field, J., dissenting). Personally, Field favored exclusion of the Chinese and he believed as early as the 1870s that power over immigration was vested exclusively in Congress. *See* SWISHER, *supra* note 78, at 205-39. While opposing “petty annoyances” of the Chinese, he told an interviewer in 1879:

We are alarmed upon this coast at the incursion of the Chinese. . . . [A]ll classes of our society . . . have a serious apprehension of the consequences of Chinese immigration. In the language of Senator Booth, we declare that it is our conviction ‘that the practical issue is, whether the civilization of this coast, its society, morals, and industry, shall be of American or Asiatic type.’ It is to us a question of property, civilization, and existence.

Interview with both Frank M. Pixley, S.F. ARGONAUT, and Whitelaw Reid, N.Y. TRIBUNE, SWISHER, *supra* note 78, 221 (quoting S.F. ARGONAUT (Aug. 9, 1879)).

145. For proof of how unnecessary were Justice Field’s “facts” about the Chinese to deciding the issues presented in *Chae Chan Ping*, compare Judge Sawyer’s opinion in the Circuit Court below. *In re Chae Chan Ping*, 36 F. 431 (C.C.D. Cal. 1888).

In 1892, in *Nishimura Ekiu v. United States*,<sup>146</sup> the Court decided another case, which though interpreting a general immigration statute rather than statutes commanding Chinese exclusion, had a profound effect on future decisions of the Court in relation to the Chinese. In *Nishimura Ekiu*, immigration officials refused admission to a Japanese woman finding her excludable as "a person without means of support, without relatives or friends in the United States . . . , unable to care for herself, and liable to become a public charge . . . ."<sup>147</sup> The statute expressly provided that "[a]ll decisions made by the inspection officers . . . touching the right of any alien to land, when adverse to such right, shall be final, unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the secretary of the treasury."<sup>148</sup> The Petitioner argued that due process required judicial review of the immigration official's fact-finding. The Court again held that the Constitution had vested in the political branches of the national government exclusive power over the regulation of immigration and added that Congress could delegate fact-finding to executive officers and assign finality to their decisions. "[N]o other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he, [the inspector], acted."<sup>149</sup> Justice Brewer dissented without opinion. Justice Harlan silently voted with the majority.

In *Nishimura Ekiu*, the Court deferred to Congress not only on the substantive policy decisions embodied in immigration statutes, as it had done already in *Chae Chan Ping*. The Court went further and deferred also on the procedural claims presented. By reading congressional power broadly and the statute literally, the Court denied itself the authority to consider future procedural fairness claims. These claims were bound to arise under a system of enforcement, created by

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146. 142 U.S. 651 (1892).

147. *Id.* at 656. This language tracked the provisions of the statute listing the bases for excluding an immigrant. Petitioner was 25 years old and her passport indicated she was traveling with her husband to San Francisco, which was not the case. After what appears to have been a summary inquiry on board ship, the immigration official refused her entry. She claimed to have come to the United States to join her husband who had been a resident for over a year. She was unable to give his address or indicate how she was to find him. She claimed she was to find lodgings in a hotel and wait for him to find her. It seems clear that the immigration officer who refused her entry did not believe her story but that no effort was made to verify it. On habeas, the court below refused her proffer of proof of her right to enter the country holding that Congress had made findings by immigration officials unreviewable by the courts. *Id.* at 652-53.

148. *Id.* at 653-54.

149. *Id.* at 660.



Congress' broad delegation of fact-finding to inspectors, in which many of those charged with enforcement believed it their duty to keep Asians out whenever and however possible. In this, again they were probably carrying out the true intent of the political branches. By its reading, the Court denied itself the power to intervene, review, and reverse unfounded or unfair findings. This, in turn, meant that the Court would deny itself any role in the case by case fact-finding upon which the enforcement of immigration policies would depend. In 1894, Congress used the Court's decision in *Nishimura Ekiu* to enact a general prohibition against judicial review of immigration fact-finding.<sup>150</sup>

Although *Nishimura Ekiu* displays, to the modern eye, a stunning lack of interest in the procedures employed by the inspectors in making their factual determinations, it is important to remember that modern due process had not yet been invented and that by doing what it did, the Court was responding to a clear statutory expression of congressional intent that the courts not be involved in the process. It is hard to imagine the late nineteenth century Court taking on the task of specifying how the inspectors must go about their work. The Court deferred, accepting the command of Congress in an area, which the majority believed belonged to Congress and the executive.<sup>151</sup> As a result, Congress, rather than the Court, deserves whatever opprobrium is attached to procedures, which in practice often denied petitioners a fair hearing before an impartial decision maker.

Four years after *Chae Chan Ping*, a second important case, *Fong Yue Ting v. United States*,<sup>152</sup> challenged the revisions to the Exclusion

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150. See Act of July 18, 1894, ch. 301, p. 320, 28 Stat. 1893-94.

[I]n every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury.

*Id.* Congress may have enacted this language in part because of the Court's decision in *Lau Ow Bew*, 144 U.S. 47 (1892), and to make clear that the statute applied to alien residents who left the country and sought to return as well as to those seeking admission for the first time.

151. For examples of this deference in later cases, see *Lem Moon Sing v. United States*, 158 U.S. 538 (1895); *Fok Young Yo v. United States*, 185 U.S. 296 (1902); *Lee Gon Young v. United States*, 185 U.S. 306 (1902); *Yamataya v. Fisher*, 189 U.S. 86 (1903); *Sing Tuck v. United States*, 194 U.S. 161 (1904); and *Ju Toy v. United States*, 198 U.S. 253 (1905). But even deference had some limits. In *Yamataya*, Harlan, writing for the Court, warned that immigration officials were subject to some procedural constraints the violation of which might lead to court review of their proceedings. In *Ju Toy*, the Court hinted that an allegation that the immigration official had abused his authority might present a case for judicial review. Finally, in *Chin Yow v. United States*, 208 U.S. 8 (1908), the Court held that, at least as to those claiming citizenship, petitioners could obtain court review if they proved that the administrative hearing had been unfair.

152. 149 U.S. 698 (1893). The Court decided two other cases relating to Chinese

regime embodied in the Geary Act of 1892. *Fong Yue Ting* is a critical case in the revisionist argument against Harlan and is one of the cases the Court cited most frequently in future cases involving Chinese immigration. In *Fong Yue Ting*, the Court reviewed the cases of three Chinese men who had entered the country lawfully before passage of the Chinese Exclusion Act of 1882.<sup>153</sup> The Geary Act renewed the Exclusion Regime for ten more years. In addition, it required the Chinese who were legally resident in the country to obtain a certificate of identification within one year or be subject to arrest, imprisonment, and then expulsion from the United States. Thus the case involved not

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immigration between *Chae Chan Ping* and *Fong Yue Ting*, both were overshadowed by the three famous and formative cases *Chae Chan Ping*, *Nishimura Ekiu*, and *Fong Yue Ting*. Harlan participated in both but failed to write an opinion in either.

The first of these cases was *Quock Ting v. United States*, 140 U.S. 417 (1891). In *Quock Ting*, a sixteen-year-old Chinese youth was denied admission to the country despite his claim to have been born in San Francisco and to have lived there until he was ten years old. At the age of ten, he and his father both claimed, he traveled to China with his mother and remained there for six years. In response to a habeas petition, claiming he was wrongfully excluded from the country because he was a citizen of the United States, the court below, after a hearing, found that he had failed to establish his birth in the United States, and denied him entry. On appeal to the Supreme Court, Justice Field, writing for the majority, held that despite the fact that the testimony of the boy and of his father was uncontradicted, the finder-of-fact did not have to believe their evidence. The Court did what appeals courts are supposed to do, it deferred to fact-finding below unless there was no evidence to support the finding or reasonable persons could not have reached the result below based on the evidence. Justice Brewer wrote a lone dissent in which he acknowledged that the case turned on a question of fact but argued that uncontradicted testimony must be taken as true. Brewer concluded: "The government evidently rested on the assumption that because the witnesses were Chinese persons they were not to be believed. I do not agree with this." *Id.* at 424 (Brewer, J., dissenting).

The second case was *Wan Shing v. United States*, 140 U.S. 424 (1891). In *Wan Shing*, the habeas petitioner was denied re-entry, after passage of the Scott Act of 1888, upon his return from China. He claimed to be a merchant doing business in San Francisco. The court below found that he failed to prove this claim. On appeal, Justice Field, writing for a unanimous Supreme Court, held that since the petitioner could not produce the certificate from the Chinese government required of merchants by the 1888 Act, he was properly denied entry. Field held that the 1888 Act made this certificate "the sole evidence permissible" to establish a merchant's right to enter the country. *Id.* at 427. The Court applied the literal language of the statute.

153. The facts alleged in the three cases were well designed to test the constitutionality of all elements of section 6 of the statute. The first petitioner, though resident before the passage of the act, had never applied for the required certificate. *Fong Yue Ting v. United States*, 149 U.S. 698, 702 (1893). The second petitioner, alleged similar facts but added that the petitioner had been ordered deported "without any hearing of any kind." *Id.* at 703. The third petitioner alleged that though he had established his legal residence by the testimony of Chinese witnesses to the satisfaction of a federal judge, he was denied a certificate because he could not produce at least one "credible white witness, as required by the statute." All three petitioners alleged that they had been arrested and detained without due process of law and that section 6 of the 1892 Act was unconstitutional. *Id.* at 703-04.

only Congress' "plenary power" over immigration but also its power to require Chinese residents to obtain "identity cards," and the power to order the expulsion, without trial, of Chinese immigrants who were already lawfully resident in the country.

Writing for the majority, Justice Gray sustained the statute and denied the petitioners relief. Gray refused to distinguish between the Chinese lawfully resident in the United States and those who sought admission. Relying on *Chae Chan Ping* and citing numerous treatises on international law as well as English case law, Gray held that Congress had the same plenary power over both groups.<sup>154</sup> He also rejected the proposition that deportation was punishment and, as such, required a trial before it could be imposed.<sup>155</sup> As a result, he also rejected the argument that this power could be exercised only with judicial oversight. Ignoring how difficult it might be to locate white witnesses who could testify about a petitioner's residency status, Gray also held that placing the burden of proof on the petitioner and limiting the kind of evidence that was admissible (such as requiring the testimony of at least one "credible white witness"), as Congress had done, was "within the acknowledged power of every legislature . . . ."<sup>156</sup> Finally, Gray held that in requiring them to obtain identity papers Congress had done nothing more than to exercise its power to attach conditions to the privilege, extended at congressional sufferance to the Chinese, of remaining in the country.<sup>157</sup> Noncompliance with these conditions resulted in abrogation of their licenses to stay. Gray relied heavily on Justice Field's opinion in *Chae Chan Ping* to support these conclusions.

Justice Brewer, who joined the Court in January, 1890, and had not participated in *Chae Chan Ping*, wrote a powerful dissent in *Fong Yue Ting*.<sup>158</sup> Although acknowledging that Congress had plenary power over

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154. *Id.* at 705-11. "The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country." *Id.* at 707. Gray ignored the fact that the Chinese could not take steps to become citizens because Congress had denied them access to citizenship by naturalization.

155. *Id.* at 709 ("Deportation" is the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated.").

156. *Id.* at 729.

157. *Id.* at 714 ("Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides.").

158. *Id.* at 733.

Chinese immigration, Brewer challenged almost all of Gray's other conclusions. Brewer argued that the Chinese, who had lawfully entered the country with the intent to remain in the United States under the treaties, which preceded the Exclusion Acts, were entitled to the same protections under the Constitution as any other "person" residing within the territory of the United States.<sup>159</sup> He insisted that the Bill of Rights applied to them and that they could not be deported without due process.<sup>160</sup> In effect, Brewer argued for an intermediate status between alienage and citizenship that entitled members of the class, "legal aliens permanently resident in the United States," (domiciliaries) to all of the protections guaranteed by the Constitution to "persons" within the jurisdiction of the United States.<sup>161</sup> Finally, Brewer insisted that deportation of a resident alien was punishment and as such could be imposed only after a trial.<sup>162</sup> As his dissent in *Fong Yue Ting* suggested, Brewer would become the champion of the Chinese in many of the cases which came to the Court thereafter.<sup>163</sup>

159. Justice Brewer stated:

It is said that the power here asserted is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists.

*Id.* at 729 (Brewer, J., dissenting). Later, he continued:

Whatever may be true as to exclusion . . . I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens. . . . [T]he constitution has potency everywhere within the limits of our territory, and the powers which the national government may exercise within such limits are those, and only those, given to it by that instrument.

*Id.* at 737-38.

160. *Id.* at 737 ("[W]hatever rights a resident alien might have in any other nation, here he is within the express protection of the constitution, especially in respect to those guaranties which are declared in the original amendments.").

161. *Id.* at 738.

162. "Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel." *Id.* at 740. Brewer continued:

[P]unishment implies a trial: "No person shall be deprived of life, liberty, or property without due process of law." Due process requires that a man be heard before he is condemned, and both heard and condemned in the due and orderly procedure of a trial, as recognized by the common law from time immemorial.

*Id.* at 741.

163. See Chin, *Harlan By the Numbers*, *supra* note 11, at 638-39. Brewer also dissented in *Nishimura Ekiu* but did not write an opinion. Justice Brewer's championship of the Chinese and of immigrants in general appears to have been rooted in his religion. He argued that by welcoming all immigrants, the United States was making it possible for home missionaries to proselytize the world and for humanity to be perfected. In describing the future American, he used the metaphor of a composite photograph of all of the races of

Surprisingly, Justice Field wrote in dissent as well. He too distinguished exclusion of the Chinese immigrants from deportation of Chinese lawfully domiciled in the United States, arguing that the latter were entitled to all of the provisions of the Constitution for protection of their persons and property.<sup>164</sup> Field pointed out that the cases cited by the majority were all cases involving the exclusion of aliens as they sought admission to the country and did not address the question of deporting them after they had become legally domiciled here.<sup>165</sup> Field regarded the decision as “a blow against constitutional liberty, when it declares that [C]ongress has the right to disregard the guarantees of the constitution intended for the protection of all men domiciled in the country with the consent of the government, in their rights of person and property.”<sup>166</sup>

Despite one scholar's assertion to the contrary, Harlan did not participate in *Fong Yue Ting*.<sup>167</sup> Harlan had sailed for France on August 6, 1892,<sup>168</sup> to serve as one of the American representatives in the Bering Sea Fur-Seal Arbitration. Harlan did not return to the United States until October 5, 1893.<sup>169</sup> The opinion in *Fong Yue Ting* was announced on

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humanity with only the best traits of each race remaining. See Justice Brewer, Address to the American Home Missionary Society, Washington, D.C. (Sept. 1892), in LXV THE HOME MISSIONARY 275 (Sept. 1892), available at <http://archive.org/stream/homemissionaryma65amer#page/275/mode/1up>. In 1904 in Milwaukee, Wisconsin, Brewer expressed his views on Chinese Exclusion very clearly when he spoke before a meeting of the Northwestern Mutual Life Insurance Agents' Association and said: “I think that the time will come when the people of the United States will look back to the barbarous laws excluding the Chinese, as the citizens of Massachusetts look back to the hanging of the witches.” In the same speech, he again used the metaphor of the future American as a composite photograph of all human races. See *Says U.S. Is Photographer; We Must Take All Nations for One Picture—Justice Brewer*, N.Y. TIMES, July 22, 1904.

164. *Fong Yue Ting*, 149 U.S. at 754-56 (Field, J., dissenting).

165. *Id.* at 757.

166. *Id.* at 760.

167. Professor Maltz suggests that Harlan's silence in *Fong Yue Ting* coupled with his dissent in the case of *Wong Kim Ark*, which I will discuss later, “create a dramatic counterpoint to his famous dissents in *Plessy* and the *Civil Rights Cases*. In the latter cases, he stood alone in advocating stronger protection for the rights of free Blacks. By contrast,” Professor Maltz argues, “he was the only Justice to join both the majority in *Fong Yue Ting* and the dissent in *Wong Kim Ark*.” Maltz, *Only Partially Color-Blind*, *supra* note 10, at 1014-15. Maltz concluded that “Harlan took a consistently anti-Chinese position on other constitutional issues that came to the Court.” *Id.* This mistake has been surprisingly long-lived and continues to appear in the literature. See Goodwin Liu, *The First Justice Harlan*, 96 CALIF. L. REV. 1383, 1385-86 (2008). Professor Chin recognized that Harlan did not participate in *Fong Yue Ting* but he suggested that Harlan agreed with the majority.

168. YARBROUGH, *supra* note 3, at 187-88.

169. “Justice John H.[sic] Harlan of the United States Supreme Court was a passenger on the steamship *Majestic*, which reached her pier yesterday. . . . To a reporter for The N.Y. Times he said that he was preparing a report on the Bering Sea arbitration.” *Supreme Court*

May 15, 1893. The case was argued and decided while Harlan was out of the country.

If one wishes to speculate on how Harlan might have voted had he participated in *Fong Yue Ting*, it is helpful to compare Brewer's dissent in *Fong Yue Ting* with Harlan's dissents in the *Insular Cases*.<sup>170</sup> It is striking how similar they are. In the *Insular Cases*, Harlan embraced the argument his friend Brewer had made in his *Fong Yue Ting* dissent that "the [C]onstitution has potency everywhere within the limits of our territory, and the powers which the national government may exercise within such limits are those, and only those, given to it by that instrument."<sup>171</sup> In *Fong Yue Ting*, Brewer had argued, as Harlan would argue eight years later in his dissent in *Downes v. Bidwell*,<sup>172</sup> that it was the jurisdiction of the United States, which determined the rights of a petitioner, not his or her race.<sup>173</sup> The parallels between these dissents suggest that had Harlan participated in *Fong Yue Ting*, he might have sided with Brewer on one of the pivotal questions in the case.<sup>174</sup>

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*Justice Returns*, N.Y. TIMES, Oct. 6, 1893.

170. *Dorr v. United States*, 195 U.S. 138, 154 (1904) (Harlan, J., dissenting); *Hawaii v. Mankichi*, 190 U.S. 197, 226 (1903) (Harlan, J., dissenting); *Downes v. Bidwell*, 182 U.S. 244, 375 (1901) (Harlan, J., dissenting).

171. *Fong Yue Ting*, 149 U.S. at 738 (Brewer, J., dissenting).

172. *Downes*, 182 U.S. at 276 (1901) (Harlan, J., dissenting).

173. See Gordon, *supra* note 12, at 393-96; see also Eric Schepard, *The Great Dissenter's Greatest Dissents: The First Justice Harlan, the "Color-Blind" Constitution and the Meaning of His Dissents in the Insular Cases for the War on Terror*, 48 AM. J. LEGAL HIST. 119 (2006). But see *United States v. Sing Tuck*, 194 U.S. 161 (1904). In *Sing Tuck*, a majority, which included Harlan, speaking through Justice Holmes, refused to review the decision of an immigration agent who refused re-entry to a person claiming to be an American citizen of Chinese ancestry. Brewer, in dissent, catalogued a myriad of violations of due process embodied in the rules promulgated by the Secretary of Commerce and Labor, regulating immigration officers, and what he labeled the "Star Chamber" proceedings over which they presided.

174. There is a piece of evidence, not ever presented elsewhere to my knowledge, which may suggest Harlan would have voted with the majority in *Fong Yue Ting*. From Paris, on March 30, 1893, Harlan wrote a teasing, playful letter to his friend Justice Brewer. See Letter from Justice John Marshall Harlan to Justice David J. Brewer (Mar. 30, 1893), DAVID JOSIAH BREWER PAPERS, SERIES I, BOX 1, FOLDER 40, in Yale University Library Collection, Archives and Manuscripts Division. Unfortunately, part of the joke was that Harlan wrote the letter in French, a language with which he appears to have been somewhat acquainted but in which he was not really fluent. As a result, understanding exactly what Harlan meant presents a puzzle in translation and interpretation. Harlan's handwriting, always difficult to decipher, becomes even more difficult to read when he is writing in a foreign language. Despite these concerns, one paragraph of the letter is important because it suggests that Harlan, himself, was against large-scale, unregulated, Chinese immigration. After a warm salutation and a pleasant good morning, Harlan wrote:

Les journaux vous représente de nouveau apparaissant devant le public – cette fois-ci défendant les droits fondamentaux permettant les Chinois de s'attrouper en

Of course, this is speculation. What cannot be disputed, though, is that in later cases that raised the issues decided in *Fong Yue Ting*, that case was, on Harlan's return to the Court, a *fait accompli*. After the decisions in *Chae Chan Ping* and *Fong Yue Ting*, the precedents clearly confirmed Congress' plenary power over immigration and commanded judicial deference to the political branches in matters involving

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fourmilière à travers notre pays selon leur désir. Je dois avouer que je suis contraire à cette opinion et durant le cours de l'été je me promets de vous envoyer mes vues complètes en Français. L'usage de ma langue anglaise me deviant passablement gênante.

A literal translation of this paragraph, including some possible variant translations of some individual words [placed in brackets] might be:

The newspapers report [present or depict] you once again as appearing before the public – this time supporting the fundamental rights allowing the Chinese to gather together [to flock together] in crowds [in the anthill] to cross to our country according to their pleasure [at will]. I must confess [acknowledge] that I am opposed to [against] this opinion and during the course of the summer I propose [promise myself] to send you my complete views in French. Use of my English language is becoming fairly troublesome [inconvenient].

Harlan's use of the word "fourmilière" illustrates the problem inherent in translation. If Harlan used the word "fourmilière" to mean "anthill" and meant to conjure the image of the Chinese in China as swarming in an anthill, that would tell us something important about his attitude toward the Chinese. If, on the other hand, he used the word to mean "a crowded place" one's impression would be very different.

*Fong Yue Ting* was argued to the Court on May 10, 1893, and the decision was announced on May 15, 1893, six weeks after Harlan's letter to Brewer. This means that the reference in the letter to Brewer "appearing before the public" in support of unlimited Chinese immigration rights could not have been a reference to Brewer's dissenting opinion in that case. I have been unable to locate any American newspaper report that Brewer had made a public statement about Chinese immigration in the weeks preceding Harlan's letter. Likewise, I have been unable to find Harlan's "summer letter" (if it was ever written) setting out Harlan's complete views on Chinese immigration. What a find that would be!

There are two things worth observing as one seeks to understand the position Harlan appears to stake out in this letter. First, as described by Harlan, the newspapers reported that Brewer favored unlimited and unregulated Chinese immigration as a fundamental right. When Harlan expressed his opposition to this view, was he against all Chinese immigration to the United States? Was he against *unlimited* Chinese immigration? Was he against Chinese immigration *without regulation*? Or, perhaps, his opposition was to the idea that immigration to the United States could be a *fundamental right* for aliens? This would open the door for all immigrants, something Harlan's nativist inclinations would, of course, lead him to oppose. Like all of the rest of the evidence, Harlan's statement here is ambiguous. It does not make clear which of these possible positions he intended to communicate to Brewer.

Second, it seems strange, given the intimacy of their friendship and the ongoing public and judicial preoccupation with Chinese immigration in the 1880s and early 1890s, that, if Harlan had strong views about Chinese immigration, he only now communicated these views to his friend Brewer. If Harlan was an anti-Chinese racist, how could Brewer have been unaware of this fact? Given Brewer's strongly-held views on these questions, revealed in his *Fong Yue Ting* dissent and in numerous cases thereafter, the fact that he did not know Harlan's views on Chinese immigration may suggest that Harlan had no strong opinions on the subject one way or the other at the time *Fong Yue Ting* was decided.

immigration policy. Since the Court had already held, in *Nishimura Ekiu*, that Congress could give finality to the findings of fact made by immigration officials, (that there could be no judicial review of such findings), Harlan was bound thereafter by well-settled precedents to follow these holdings whether he agreed with them or not. *Stare decisis* controlled Harlan's discretion and he *did* defer.

In 1895, in *Lem Moon Sing v. United States*,<sup>175</sup> when Harlan wrote on Chinese immigration for the first time since *Chew Heong* and *Jung Ah Lung*, his opinion clearly reflected the limits imposed on him by precedent, especially by *Nishimura Ekiu* and *Fong Yue Ting*. In *Lem Moon Sing* Harlan did little more than cite prior decisions of the Court and indicate that they were controlling.

Lem Moon Sing was a Chinese druggist who had been domiciled in San Francisco for two years when he took a trip to China. On his return, the Collector of San Francisco refused to admit him though the petitioner claimed to be a merchant exempt from the Exclusion regime. In 1894, Congress had provided that whenever an alien, claiming a right to admission under any law or treaty, was excluded from admission, "the decision of the appropriate immigration or customs officers, if adverse to the admission . . . shall be final, unless reversed on appeal to the Secretary of the Treasury."<sup>176</sup> Lem Moon Sing petitioned for a writ of habeas corpus claiming on due process grounds, that he was entitled to have his exclusion reviewed by the federal courts. The court below held that because of the statute it had no jurisdiction and dismissed the habeas petition.

Harlan, writing for the Court, held that the case was "in principle, covered by the former adjudications of this court."<sup>177</sup> Citing *Chae Chan Ping* and *Fong Yue Ting* and, applying the plenary power doctrine, Harlan repeated that Congress had the power to exclude aliens from the country and that when an alien resident voluntarily left the country, even briefly, his or her readmission was at the sufferance of Congress.<sup>178</sup> Then, quoting from *Nishimura Ekiu*, Harlan wrote:

[A]lthough congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet congress might intrust the final determination of those facts to an executive officer, and . . .

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175. 158 U.S. 538 (1895).

176. Act of Aug. 18, 1894, ch. 301, 28 Stat. 372, *quoted in Lem Moon Sing*, 158 U.S. at 540.

177. *Lem Moon Sing*, 158 U.S. at 541.

178. *Id.* at 543.



if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted or to controvert its sufficiency . . . . The power of congress, therefore, to expel, like the power to exclude, aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers . . . .<sup>179</sup>

Harlan noted that the petitioner did not challenge the power of Congress to give finality to immigration officers' decisions in cases of first entry by a merchant after the passage of the 1894 Act. The petitioner argued that since he was a merchant domiciled in the United States before passage of the Act and entitled to return, he was also entitled to a judicial hearing before being stripped of that right. If he had the right to re-enter, the argument continued, it was beyond the scope of the immigration officer's authority to exclude him and thus the door to judicial review was open as a matter of due process. The contention, according to Harlan, was that in cases where the alien was rightly excluded, the immigration officers' decision was not subject to judicial review, but that in cases where the immigration officer wrongly excluded an alien, the courts had power to review that decision. "That view, if sustained," Harlan observed:

[W]ould bring into the courts every case of an alien claiming the right to come into the United States under some law or treaty, but who was prevented from doing so by the executive branch . . . . This would defeat the manifest purpose of congress in committing to subordinate immigration officers and to the secretary of the treasury exclusive authority to determine whether a particular alien seeking admission into this country belongs to the class entitled by some law or treaty to come into the country, or to a class forbidden to enter the United States. Under that interpretation . . . the provision . . . would be of no practical value.<sup>180</sup>

Given the premise that Congress could give fact-finding by immigration officials finality in these cases, the conclusion followed. The Court would soon struggle with the same questions in relation to review of fact-finding by other administrative agencies and, in the early Twentieth Century reach the same result.<sup>181</sup> Given the clarity of the

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179. *Id.* at 545 (citation omitted).

180. *Id.* at 547.

181. See *Interstate Commerce Comm'n v. Ala. Midland Ry. Co.*, 168 U.S. 144, 176 (1897) (Harlan, J., dissenting) (Harlan dissented in favor of a broad reading of national power and because the decision made the I.C.C. impotent); see also *Ill. Central Ry. Co. v. Interstate Commerce Comm'n*, 206 U.S. 441 (1907) (Court deferred to fact-finding by administrative agency). Brewer dissented in *Ill. Central Ry. Co.*

statutory language and the Court's prior decisions, it is difficult to see how the Court or Harlan could have reached a different conclusion. Harlan said this expressly in his opinion.<sup>182</sup>

Harlan carefully distinguished the situation of an alien seeking admission to the United States from abroad, even one who was domiciled in the United States, from that of an alien physically present in the country. The latter "[w]hile he lawfully remains here . . . is entitled to the benefit of the guaranties of life, liberty, and property secured by the constitution to all persons, *of whatever race*, within the jurisdiction of the United States."<sup>183</sup> Harlan continued: "His personal rights when he is in this country . . . are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States."<sup>184</sup>

This was the position Harlan consistently took in the Chinese cases not involving immigration and foreshadowed the position he would later take in his *Insular Cases* dissents. This language, though dicta in the case, seems to confirm my earlier speculation that had Harlan participated in *Fong Yue Ting* he might well have joined Brewer's dissent on this point.<sup>185</sup>

Harlan ended his opinion by emphasizing that the Court's decision had nothing to do with the merits of Lem Moon Sing's claim. "We mean only to decide that that question has been constitutionally committed by congress to named officers of the executive department of

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182. "There is no room in the language of the act of 1894 to doubt that congress intended that it should be interpreted as we have done in this case." *Lem Moon Sing*, 158 U.S. at 549. The Court would return to this "judicial restraint" theme over and over again, sometimes expressing what seems like sympathy for the excluded Chinese and criticism of the inflexible Exclusion regime. "We cannot . . . yield to the earnest contention made in behalf of inoffensive Chinese persons who seek to come within the limits of the United States and subject themselves to their jurisdiction, by modifying or relaxing, by judicial construction, the severity of the statutes under consideration." *Li Sing v. United States*, 180 U.S. 486, 495 (1901); *see also* *Fok Young Yo v. United States*, 185 U.S. 296, 305 (1902); *Lee Gon Yung v. United States*, 185 U.S. 306, 307 (1902).

183. *Lem Moon Sing*, 158 U.S. at 547 (emphasis added).

184. *Id.* When he noted that Harlan did not participate in *Fong Yue Ting*, Professor Chin suggested that "Harlan's frequent citation of *Fong Yue Ting* betrayed no lack of sympathy for its reasoning or result." Chin, *The Plessy Myth*, *supra* note 11, at 161. In support of this observation, in a footnote, he cites Harlan's references to the case in *Lem Moon Sing* and *Yamataya*. In that note, in a parenthetical to *Lem Moon Sing*, Chin described Harlan's opinion in *Lem Moon Sing* as "discussing *Fong Yue Ting* at length with approval." Chin, *The Plessy Myth*, *supra* note 11, at 161 n. 71. In *Lem Moon Sing*, Harlan did make reference to *Fong Yue Ting*'s holding that Congress had plenary power over immigration. Harlan cited the case for no other proposition. His decision in *Lem Moon Sing* rests more fully on *Nishimura Ekiu* and its holding that Congress could give immigration officers final fact-finding authority.

185. *See supra* text accompanying notes 159-75.

the government for final determination.”<sup>186</sup> This hints that Harlan would have decided the case differently on the merits had he felt himself free to do so. The simplest explanation of Harlan’s opinion in *Lem Moon Sing* is that he felt constrained to decide the case as he did, as he said he was, by the Court’s prior decisions.<sup>187</sup>

Harlan wrote again on Chinese immigration in 1902. In *United States v. Lee Yen Tai*,<sup>188</sup> a Chinese laborer was arrested in New York for coming “unlawfully . . . into the United States from China.”<sup>189</sup> After a hearing as mandated by the Exclusion Statutes, a United States commissioner found Lee Yen Tai was in the country illegally and ordered his deportation to China. The petitioner then sought a writ of habeas corpus alleging that the Sino-American Treaty of 1894<sup>190</sup> had repealed the enforcement provisions of the Exclusion Statutes by implication thereby nullifying the statutory procedures for arrest, trial, and deportation. The District Court certified the question directly to the Supreme Court.

Writing for a unanimous Court and citing his earlier opinion in *Chew Heong*, Harlan held that the treaty was not intended to repeal the Chinese Exclusion Acts by implication. Although acknowledging that a treaty could repeal an act of Congress if so intended, Harlan observed that it would do so only if the treaty said so expressly or by necessary implication. “A statute enacted by Congress . . . should never be held to be displaced by a treaty, subsequently concluded, unless it is impossible for both to stand together and be enforced.”<sup>191</sup> He then concluded that the purpose of both China and the United States in negotiating the 1894 treaty was to prevent Chinese laborers from illegally entering the United States. This purpose would be defeated if the Chinese Exclusion Acts’ procedural regime were abrogated without putting something else in its place. “A different conclusion would be hostile to the objects which, as avowed in the treaty, both the United States and China desired to accomplish. This is so clearly manifest that argument cannot, as we think, make it more so.”<sup>192</sup> Given the absence of enforcement and procedural provisions in the treaty, it is difficult to see what else the Court could have done. It is noteworthy that neither Justice Brewer nor

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186. *Lem Moon Sing*, 158 U.S. at 549-50.

187. Justice Brewer dissented but failed to write an opinion.

188. *United States v. Lee Yen Tai*, 185 U.S. 213 (1902).

189. *Id.* at 214.

190. Immigration Convention, U.S.-China, Mar. 17, 1894, 28 Stat. 1211.

191. *Lee Yen Tai*, 185 U.S. at 222.

192. *Id.* at 223.

Justice Peckham, both of whom frequently dissented in the Chinese immigration cases, dissented.<sup>193</sup>

Harlan wrote his last words on Asian immigration in 1903, in *Yamataya v. Fisher*.<sup>194</sup> Writing for a majority of seven justices, he expressed misgivings about the fairness of immigration proceedings and warned Congress and the executive that the Court's patience was not inexhaustible.

In *Yamataya*, immigration officials arrested and sought to deport a Japanese woman who had landed in Seattle days earlier. Upon investigation, the immigration agent in Seattle determined that she was a pauper and thus should not have been permitted to enter the country. Under the 1891 general immigration statute, he sought an order from the Secretary of the Treasury for her arrest and deportation. While she was being held for deportation, the petitioner obtained a writ of habeas corpus, to test her confinement. When the writ was dismissed below, she appealed to the Supreme Court.

In his opinion, Harlan conceded that it was now well-settled that the "power to exclude or expel aliens" belonged to the political department and that executive officers could be given the power to determine finally the facts related to an alien's right to enter or remain in the country.<sup>195</sup>

Quoting from *Nishimura Ekiu*, Harlan wrote:

[T]he order of an executive officer invested with the power to determine finally the facts upon which an alien's right to enter this country, or remain in it, depended, was 'due process of law, and no other tribunal, unless expressly authorized to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency.'<sup>196</sup>

However, Harlan then continued, in language that can only be read as an attempt to limit the scope of these authorities:

*But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as*

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193. For a re-evaluation of Justice Peckham's record on the Court including his position in the Chinese cases, see James W. Ely, Jr., *Rufus W. Peckham and Economic Liberty*, 62 VAND. L. REV. 591, 632-634 (2009).

194. 189 U.S. 86 (1903).

195. *Id.* at 100.

196. *Id.* (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) and *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895))).

*understood at the time of the adoption of the Constitution.*<sup>197</sup>

Harlan then expressly rejected a construction of the statutes that would allow the Secretary of the Treasury or any executive officer “arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population” to be arrested and deported without an opportunity to be heard on the question of his or her right to be and remain in the United States.<sup>198</sup> “No such arbitrary power can exist,” Harlan argued, “where the principles involved in due process of law are recognized.”<sup>199</sup> Immigration officials “may [not] disregard the fundamental principles that inhere in ‘due process of law’ as understood at the time of the adoption of the constitution.”<sup>200</sup> These fundamental principles included the right to be heard and present a defense to the official who would pass on questions involving a person’s life, liberty, or property. The hearing need not be “upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.”<sup>201</sup> Aliens who had entered the country and “become subject in all respects to its jurisdiction, and a part of the population, although alleged to be illegally here”<sup>202</sup> were entitled to those constitutional protections which guarded all persons within the jurisdiction of the United States from arbitrary arrest and conviction without an opportunity to be heard.

Still, despite the petitioner’s allegations that she lacked representation at her hearing and an understanding of English, did not understand that her deportation was at issue at the hearing, and that the hearing was “a pretended . . . one,”<sup>203</sup> Harlan offered her no relief. She was notified of the deportation investigation, participated in a hearing, and was heard by the immigration officer. Harlan did not comment on the unfairness of such a proceeding, something apparent today under our modern understanding of due process, but neither did he approve it. He did not reach the question whether she had received due process. Rather, he argued that if these allegations were true, the petitioner should have

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197. *Yamataya*, 189 U.S. at 100 (emphasis added). The Court would later act on this warning, at least in a situation where the petitioner alleged he or she was an American citizen, in *Chin Yow v. United States*, 208 U.S. 8 (1908).

198. *Yamataya*, 189 U.S. at 101.

199. *Id.*

200. *Id.* at 100. But see *United States v. Sing Tuck*, 194 U.S. 161 (1904).

201. *Yamataya*, 189 U.S. at 101.

202. *Id.*

203. *Id.* at 93.

presented her objections to the presiding officer at her hearing and, if denied satisfaction there, she should have raised them on appeal, as provided by the statutes, to the Secretary of the Treasury.<sup>204</sup> In other words, Harlan insisted on what has become known as the exhaustion of administrative remedies doctrine and refused to inquire into matters which the petitioner could have had considered by administrative authorities at her hearing or on appeal.

It seems unlikely that Justices Brewer and Peckham, who dissented in *Yamataya* without writing opinions, disagreed with Harlan's statement limiting the scope of the earlier cases and emphasizing the necessity of some version of procedural due process in the application of the immigration statutes. Brewer had argued for something like this repeatedly.<sup>205</sup> It seems more likely that they disagreed with Harlan's failure to set out clearly the minimum requirements of due process for executive hearings and his failure to award the petitioner the relief she sought.<sup>206</sup>

Harlan's position in *Yamataya* was consistent with the stance he took in a number of earlier cases. Deference for executive fact-finding did not necessarily mean Harlan would defer to *arbitrary* decision making or that he believed residents inside our borders could be treated with the same degree of impunity from review as those seeking admission from outside those borders. Those outside the border were subject to the will of Congress; those inside the border were protected fully by the Constitution without regard to their race. This reading is consistent with the position Harlan took in the non-immigration cases

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204. *Id.* at 101-02.

205. *See, e.g.,* *Fong Yue Ting v. United States*, 149 U.S. 698, 732 (Brewer, J., dissenting).

206. Harlan also seems to have been concerned about the posture of the case as a habeas appeal. Even if the petitioner's allegations were true, Harlan thought the presentation of these issues by habeas an inappropriate use of the writ. Her situation "constitutes no reason, under the acts of Congress, or under any rule of law, for the intervention of the court by habeas corpus." *Yamataya*, 189 U.S. at 102. A year later, these concerns came to the fore when Harlan silently joined the majority in *United States v. Sing Tuck*, 194 U.S. 161 (1904), in holding that other procedural remedies must be exhausted before petitioning for habeas corpus. In a detailed opinion for the Court, Justice Holmes discussed fully the reasons not to allow "a summary interruption of the regular order of proceedings, by means of the writ" *Id.* at 168. He viewed the premature resort to the writ as an "attempt to disregard and override the provisions of the statutes and the rules of the Department, and to swamp the courts by a resort to them in the first instance" *Id.* at 170. In *Sing Tuck*, Justice Brewer contested all of Holmes' premises in a powerfully reasoned dissent in which Justice Peckham joined, but they were unable to persuade the majority. *Id.* at 170-75 (Brewer, J., dissenting). As a plea for a fundamentally fairer process, at least for those Chinese claiming American citizenship, this dissent deserves to rank among the great historic appeals for fair treatment and in defense of the principle of limited government as a defense for liberty.

involving the Chinese and in the *Insular Cases* involving the inhabitants of the new insular possessions obtained in 1898. The Constitution protected all persons within the jurisdiction of the United States. Congress could determine whether to acquire overseas possessions, but having done so, the Constitution extended its protections of life, liberty, and property to the inhabitants of those territories. By coming within the jurisdiction of the United States, they had also come under the protection of the flag and the Constitution. The same was true of immigrants once inside the country.

Harlan's opinions in many of these cases seem to be examples of what Justice Holmes once described as "old Harlan . . . roll[ing] off the cases",<sup>207</sup> that is, stringing quotations and citations together without offering any original argument. These opinions are surprisingly pedestrian and uninspired when compared to the passion and flights of oratory Harlan displayed in many of his opinions on Black rights or in cases like *United States v. E. C. Knight Co.*, *Lochner v. New York*, *Standard Oil Co. of New Jersey v. United States*, and the *Insular Cases*.<sup>208</sup>

Harlan's positions in the immigration cases should be read through the lens of Harlan's generalized nativism, his strong preference for the exercise of national power, and his commitment to judicial restraint. Once the political branches had made political decisions about immigration restriction and embodied those decisions in clear and straightforward legislative language, Harlan was inclined to give them scope. Once the Court, in its more comprehensive opinions touching immigration, had created a body of settled law and principles on the subject of immigration restriction and deference to executive fact-finding, Harlan would have felt compelled by the principle of *stare decisis* to apply that law and those principles. These influences explain Harlan's votes and opinions quite well, without supposing a particular hostility to the Chinese on racial grounds.

Furthermore, it is important to recognize that even when acting under the influence of these powerful personal themes, Harlan insisted

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207. Letter from Mr. Justice Holmes to Sir Frederick Pollack (Jan. 7, 1910), in 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932, at 158 (Mark DeWolfe Howe ed., 1941).

208. *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895); *Lochner v. New York*, 198 U.S. 45 (1905), *overruled in part by* *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); *Insular Cases* (*Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901)). They also suffer by comparison to the passionate dissents that Justice Brewer wrote in a number of the Chinese cases.

on taking seriously treaty rights and the constitutional protection of all persons resident in the United States. Immigration was *sui generis*. It implicated fundamental principles of sovereignty, national power, and institutional roles. As a result, in the area of immigration, Harlan believed Congress was entitled to broad discretion. Harlan's few written opinions involving Chinese immigration are more notable for what they tell us about his approach to the judicial function than about his supposed anti-Chinese race prejudice.

C. *The Chinese and American Citizenship: United States v. Wong Kim Ark and Elk v. Wilkins*

In addition to his votes in the immigration cases, those who have argued that Harlan was anti-Chinese have pointed to *United States v. Wong Kim Ark*<sup>209</sup> to support this hypothesis. The question presented in *Wong Kim Ark* was whether a child born in the United States to lawfully resident, non-citizen, Chinese parents was a citizen of the United States under the Fourteenth Amendment. In order to answer this question, the Court had to interpret the first clause of the Fourteenth Amendment: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."<sup>210</sup> Resolution of this question turned on the meaning of "born . . . in the United States and subject to the jurisdiction thereof."

Applying the English common law in default of a constitutional definition of citizenship, the majority held that place of birth determined citizenship subject to two exceptions. Children born to foreign diplomats while in the country and those born to enemy nationals in areas that had been invaded and were under enemy occupation remained citizens of their parents' country. Applying this definition, the majority held that children born to Chinese residents were citizens despite the fact that, under federal law, their parents could not be admitted to citizenship.

Chief Justice Fuller wrote a dissent which Harlan joined. Fuller rejected the common law rule arguing it was a municipal regulation derived from English feudalism. Instead, he argued that under international law citizenship followed descent. He claimed that the language "subject to the jurisdiction thereof" would be surplusage if limited in its application to the children of diplomats because their children already were excluded under international law.<sup>211</sup> Fuller then

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209. 169 U.S. 649 (1898).

210. U.S. CONST. amend. XIV, § 1.

211. *Wong Kim Ark*, 169 U.S. at 720-21 (Fuller, J., dissenting).



argued:

But there were others in respect of whom the exception was needed, namely, the children of aliens, whose parents owed local and temporary allegiance merely, remaining subject to a foreign power by virtue of the tie of permanent allegiance, which they had not severed by formal abjuration or equivalent conduct, and some of whom were not permitted to do so if they would.

And it was to prevent the acquisition of citizenship by the children of such aliens merely by birth within the geographical limits of the United States that the words were inserted.<sup>212</sup>

Fuller continued:

The [Civil Rights Act of 1866] was passed and the amendment proposed by the same congress, and it is not open to reasonable doubt that the words 'subject to the jurisdiction thereof,' in the amendment, were used as synonymous with the words 'and not subject to any foreign power,' of the act.<sup>213</sup>

Fuller suggested that "[t]he jurists and statesmen referred to in the majority opinion, notably Senators Trumbull and Reverdy Johnson, concurred in that view, Senator Trumbull saying: 'What do we mean by 'subject to the jurisdiction of the United States''? Not owing allegiance to anybody else; that is what it means.'"<sup>214</sup> Senator Johnson had agreed with this interpretation: "'Now, all that this amendment provides is that all persons born within the United States and not subject to some foreign power (for that, no doubt, is the meaning of the committee who have brought the matter before us), shall be considered as citizens of the United States.'"<sup>215</sup> Fuller then cited *Elk v. Wilkins*,<sup>216</sup> and quoted extensively from Harlan's dissent in that case.

In *Elk*, the majority had rejected the claim to citizenship of a Native-American who had severed all ties to his tribe. In his dissent, Harlan argued that upon severance from his tribe and acquisition of

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212. *Id.* at 721.

213. *Id.* This assertion has been challenged. See Garrett Epps, *The Citizenship Clause: A "Legislative History,"* 60 AM. U. L. REV. 331, 353 (2010).

214. *Wong Kim Ark*, 169 U.S. at 721.

215. *Id.* at 721-22. Fuller ignored other comments Trumbull made during the Senate debate on the Civil Rights Act of 1866. When asked whether the Civil Rights Bill would grant citizenship to Chinese born in the United States, Trumbull, the chief drafter of the Bill, answered yes. *Id.* at 697 (quoting CONG. GLOBE, 39th Cong., 1st Sess., pt. 1 498, 563, 574 (1866)). Senator Howard expressed the same view when asked whether the citizenship clause of the proposed Fourteenth Amendment would apply to American-born children of Chinese. *Id.* at 698-99 (quoting CONG. GLOBE, 39th Cong., 1st Sess., pt. 4 2890-92 (1866)).

216. 112 U.S. 94 (1884).

residence in Nebraska, Elk, who had been born in the United States, came within the definition of citizenship set forth in the Civil Rights Act of 1866. That definition provided: "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."<sup>217</sup> Harlan argued that:

[T]he act of 1866 reached Indians not in tribal relations. Beyond question, by that act, national citizenship was conferred directly upon all persons in this country, *of whatever race*, (excluding only 'Indians not taxed,') who were born within the territorial limits of the United States, *and were not subject to any foreign power*.<sup>218</sup>

This statement makes clear that Harlan was not averse to non-white citizenship. Indeed, he endorsed it in circumstances in which the would-be citizen owed complete allegiance to the United States.<sup>219</sup>

Harlan then continued:

Our brethren . . . construe the fourteenth amendment as if it read: 'All persons born subject to the jurisdiction of, or naturalized in, the United States, are citizens of the United States and of the state in which they reside;' whereas the amendment, as it is, implies in respect of persons born in this country that they may claim the rights of national citizenship *from and after the moment they become subject to the complete jurisdiction of the United States*.<sup>220</sup>

Harlan was analogizing tribal affiliation to foreign citizenship. A Native-American, born in the United States but subject to the jurisdiction of a tribe, was, like the citizen of a foreign sovereign, born in the United States but subject to the jurisdiction of that foreign government. Neither

217. Civil Rights Act of 1866, 14 Stat. 27.

218. *Elk*, 112 U.S. at 112 (Harlan, J., dissenting) (emphasis added). Harlan noted that the language "Indians not taxed" was added to the original bill to make clear that the drafters "disclaimed any purpose to make citizens of those who were in tribal relations, with governments of their own." *Id.* at 113.

219. *Id.* at 118.

220. *Id.* at 121 (emphasis added).

If [Elk] did not acquire national citizenship on abandoning his tribe and becoming by residence in one of the states, subject to the complete jurisdiction of the United States, then the fourteenth amendment has wholly failed to accomplish, in respect to the Indian race, what, we think, was intended by it; and there is still in this country a despised and rejected class of persons with no nationality whatever, who born in our territory, *owing no allegiance to any foreign power*, and subject, as residents of the states, to all the burdens of government, are yet not members of any political community, nor entitled to any of the rights, privileges, or immunities of citizens of the United States.

*Id.* at 122-23 (emphasis added).

was “subject to the complete jurisdiction of the United States”<sup>221</sup> and so not a citizen within the meaning of the Fourteenth Amendment. It is equally clear from his dissent in *Elk* that the barrier to American citizenship, which Harlan found in the Fourteenth Amendment, was *not grounded on race*, but rather on the idea of dual allegiance. American citizenship required a complete and unconditional commitment to the American polity because, for Harlan, once a person became a citizen, he or she was entitled fully to all of the “rights, privileges, or immunities of citizens of the United States.”<sup>222</sup>

Fuller’s dissent in *Wong Kim Ark* was in part a repetition of Harlan’s argument in *Elk*. Fuller reiterated that when the Fourteenth Amendment speaks of “all persons born or naturalized in the United States, and subject to the jurisdiction thereof,” that “[t]he evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but *completely* subject to their political jurisdiction, and owing them direct and immediate allegiance. . . . To be ‘completely subject’ to the political jurisdiction of the United States,” argued Fuller, “is to be in no respect or degree subject to the political jurisdiction of any other government.”<sup>223</sup> Fuller went on to state that the cited language of the Fourteenth Amendment “undoubtedly had particular reference to securing citizenship to the members of the colored race, . . . who had been born in the United States, but were not, and never had been, subject to any foreign power.”<sup>224</sup> He concluded: “is it not the proper construction [of the language of the Fourteenth Amendment at issue] that all persons born in the United States of parents permanently residing here, *and susceptible of becoming citizens*, and not prevented therefrom by treaty or statute, are citizens, and not otherwise?”<sup>225</sup>

Fuller’s disagreement with the majority was a disagreement about the meaning of the language of the disputed provision of the Fourteenth Amendment, and over the historical meaning of citizenship under English and international law. He argued that since Congress had declared by treaty and statute that the Chinese could not become naturalized citizens of the United States, and since they retained their Chinese citizenship, they were not “fully subject to the jurisdiction of the

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221. *Id.* at 121.

222. *Id.* at 123.

223. *United States v. Wong Kim Ark*, 169 U.S. 649, 724-25 (1898) (emphasis added) (quoting *Elk v. Wilkins*, 112 U.S. at 102).

224. *Id.* at 727.

225. *Id.* at 731 (Fuller, J., dissenting) (emphasis added).

United States.”<sup>226</sup> As a result, their children, though born in the United States, could not be citizens either.

Fuller’s argument assumed that all Chinese who lived in the United States were only temporarily resident here. “[T]hey seem in the United States to have remained pilgrims and sojourners as their fathers were. At all events, they have never been allowed by our laws to acquire our nationality, and except in sporadic instances, do not appear ever to have desired to do so.”<sup>227</sup> In entertaining the conviction that Chinese residence in the United States was temporary, Justice Fuller made the same assumption about the Chinese that Justice Field had made. All of Field’s descriptions of the Chinese as standing apart, as maintaining their own language and culture, as dreaming of their return to China, all of these ideas offered support for Fuller’s assumption.<sup>228</sup> If the parents were merely “sojourning” in the United States and remained loyal subjects of the Chinese Emperor, the majority’s reading would impose American citizenship on the children of Chinese sojourners against their parents’ will, and might even compel their forced separation.<sup>229</sup> Given these assumptions, it was plausible to read the language of the Fourteenth Amendment as Fuller did. That these assumptions assume false facts (Field’s facts) and reflect ignorance of the real wishes of at least some Chinese residents seems apparent to us today, but ignorance and prejudice are not always the same thing. That race prejudice played a large role in the political decisions that the United States made in relation to Chinese immigration cannot be doubted. That the same prejudice accounted for the choices that Fuller and Harlan made in trying to respect and apply those political decisions is less clear.

Although we may read into this dispute over the meaning of language an underlying bias against the Chinese, it is not clear that Fuller was influenced by anything other than a disagreement about the meaning of the words of the text and Congress’ past actions forbidding Chinese citizenship. The assumptions of Fuller’s dissent in *Wong Kim Ark* were the assumptions entertained by many at the time. If his premises had been right (that Chinese immigrants were sojourners who neither could nor wanted to become citizens or to renounce their allegiance to the Chinese Emperor), the logic of Fuller’s position can be

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226. *Id.* at 725-26, 731-32.

227. *Id.* at 726.

228. Fuller quoted the language of *Fong Yue Ting* to that effect. *See Id.* at 725-26.

229. If, in order to preserve that child’s Chinese citizenship, the mother left the country to deliver a baby, they both might be denied readmission under the Exclusion regime. The risk of forced separation was also real since Chinese who failed to comply with the Geary Act could be forcibly deported.

understood, even if he was wrong.

Joining Fuller's dissent in *Wong Kim Ark* was consistent with Harlan's dissent in *Elk*. There Harlan had argued for the extension of American citizenship to Native Americans who severed all connections with the sovereignty of their tribes. Harlan took the same position on citizenship in the *Insular Cases* when he argued, in dissent, for extension of the rights of citizenship to the multi-racial inhabitants of the Philippines and Puerto Rico after they became territories of the United States and their allegiance to any other sovereign was thereby severed. The difference between the majority in *Wong Kim Ark* and the dissenters was not about race but rather about the unitary character of allegiance.<sup>230</sup>

That Fuller's dissent and Harlan's agreement were not necessarily the product of racism seems confirmed by the fact that Fuller had himself dissented in *Fong Yue Ting*. In that dissent, Fuller made it clear that although the Chinese might be excluded by Congress through the exercise of its plenary power over immigration, the Chinese who were legally domiciled in the United States were still protected by the Fifth and Fourteenth Amendments, "which forbid that any person shall be deprived of life, liberty, or property without due process of law . . . ."<sup>231</sup> These clauses, Fuller argued, were "universal in their application to all persons within the territorial jurisdiction [of the United States] without regard to any differences of race, of color, or of nationality . . . ."<sup>232</sup>

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230. In Professor Chin's discussion of *Wong Kim Ark*, he referred to the brief submitted by the Justice Department and observed: "The Justice Department could have rested its argument solely on the technical principle of international law which, it claimed, rendered Chinese not fully 'subject to the jurisdiction' of the United States. Instead, the government appealed explicitly to race . . . ." Chin, *The Plessy Myth*, *supra* note 11, at 158. Professor Chin associated Justice Harlan with the obnoxious brief by suggesting that:

When faced with the prospect of *Chinese* citizens, . . . Harlan, along with Chief Justice Fuller, balked. Evidently persuaded by the reasoning of the Justice Department, they determined that American-born Chinese "cannot become citizens nor acquire a permanent home here, no matter what the length of their stay may be."

*Id.* (quoting *Wong Kim Ark*, 169 U.S. at 731). But, the fact that the brief urged a racist basis for decision does not mean that Fuller and Harlan embraced it. Fuller did make the assumption that the Chinese were sojourners, but there is nothing else in his opinion that suggests he embraced the other racist arguments of the Justice Department brief. Loren Beth states that Fuller worked hard behind the scenes to recruit other justices to his views but succeeded only in attracting Harlan. "Why Harlan followed him," Beth writes, "is a minor mystery." BETH, *supra* note 3, at 237. Given Harlan's opinion in *Elk*, it would be surprising if he had not joined Fuller's dissent. More to the point, Fuller's opinion *did* rest upon his assertion that a "technical principle of international law . . . rendered [the] Chinese not fully 'subject to the jurisdiction' of the United States." *Wong Kim Ark*, 169 U.S. at 732 (Fuller, J., dissenting).

231. *Fong Yue Ting v. United States*, 149 U.S. 698, 761 (1893) (Fuller, J., dissenting).

232. *Id.* at 761-62.

Fuller continued:

Conceding that the exercise of power to exclude is committed to the political department, and that the denial of entrance is not necessarily the subject of judicial cognizance, the exercise of the power to expel, the manner in which the right to remain may be terminated, rests on different ground, since limitations exist or are imposed upon the deprivation of that which has been lawfully acquired.<sup>233</sup>

The general government "cannot . . . arbitrarily deal with persons lawfully within the peace of its dominions" and therefore cannot deny them, without regard to race, due process.<sup>234</sup> This is the position that Harlan took himself in *Lem Moon Sing, Baldwin*, and in other Chinese cases, and he would take again in the *Insular Cases*.

D. *The Other Chinese Cases: Cases Not Involving Congress' Plenary Power over Immigration*

It is a mistake to treat the immigration cases and the Court's one case involving Chinese citizenship as the sum of the Court's encounter with the problem of race and the Chinese. In a number of other cases involving the rights of Chinese in America, Harlan took a much more protective posture than in the immigration cases. In these "other" cases, he supported applying the Fourteenth Amendment protections of life, liberty, and property, to limit governmental discrimination against the Chinese and to protect individual Chinese from private violence or oppression.

Two early cases raised Fourteenth Amendment challenges to a San Francisco ordinance imposing regulation on laundries and forbidding them to operate between the hours of 10 p.m. and 6 a.m.<sup>235</sup> In the first of these cases, *Barbier v. Connolly*, the Court viewed the ordinance as "purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies"<sup>236</sup> and

233. *Id.* at 762.

234. *Id.*

235. See *Barbier v. Connolly*, 113 U.S. 27 (1884); *Soon Hing v. Crowley*, 113 U.S. 703 (1885).

236. *Barbier*, 113 U.S. at 30. In his opinion for a unanimous Court, Justice Field, treated the ordinance as a neutral fire protection regulation, a typical police power regulation protecting the health and safety of the people of the city. He further held that it discriminated against no one because "[a]ll persons engaged in the same business within [the same area] are treated alike." *Id.* at 31. Even though Justice Field must have known about its discriminatory motive, the Court made no attempt to look through the articulated purpose of the ordinance to uncover that discriminatory purpose (the desire to deny Chinese residents, who had a near monopoly of the laundry business in San Francisco, one of the few occupations at which they could make their living).

sustained the regulation. In the second case, *Soon Hing v. Crowley*, the petitioner challenged a similar ordinance but now informed the Court that many laundrymen were Chinese, that there was “great antipathy and hatred” directed at the Chinese in San Francisco, that to run a laundry it was necessary to work at night, and alleged that the real purpose of the ordinance was to drive them out of business.<sup>237</sup> The petition alleged both a violation of the Burlingame Treaty and of the equal protection clause of the Fourteenth Amendment. On appeal, the Court speaking again through Justice Field upheld the ordinance as a legitimate police power regulation. It rejected both a freedom of contract argument against the regulation of working hours and, more importantly, refused to delve into the motives for enactment. The unspoken motives of the supervisors were not a matter for the courts. “The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.”<sup>238</sup> But, Field continued, even if a discriminatory motive could be proven, “the ordinance would not be thereby changed from a legitimate police regulation, *unless in its enforcement it is made to operate only against the class mentioned . . .*”<sup>239</sup>

The lawyers representing the Chinese petitioners were on a learning curve and so was the Court. The very next case, *Yick Wo v. Hopkins*,<sup>240</sup> alleged and proved Field’s “unless” and established a foundational equal protection principle.<sup>241</sup> In *Yick Wo*, the Court reviewed the constitutionality of San Francisco ordinances that required laundries to be located only in buildings of brick or stone. The ordinances allowed

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237. *Soon Hing*, 113 U.S. at 706.

238. *Id.* at 711.

239. *Id.* (emphasis added).

240. 118 U.S. 356 (1886).

241. This pattern of claim, response by the Courts, and then adjusted claim, pervaded the Chinese cases as lawyers adjusted their allegations and strategy to work the gaps in court opinions. From the number of cases brought and from their evolving character it is clear that persistent, well-funded, interest group litigation produced these cases. See MCCLAIN, *supra* note 14, at 147-172, 191-219. Although trapped in the immigration cases by its early definitive holdings that Congress had plenary power over immigration and that decisions by immigration agents were not reviewable by the courts, at least some members of the Court showed a capacity for growth as they became more educated about the circumstances of the Chinese on the West Coast. McClain describes the laundry cases as an example of “judicial willingness to defend the rights of unpopular minorities in the face of popular pressure” and as representative of the Jacksonian principle that “individuals should be free from the effects of legislative favoritism as they sought to advance themselves economically through the pursuit” of a trade. *Id.* at 130-31. A similar capacity for growth did finally manifest itself even in regard to the finality of administrative decision-making and due process. See *Yamataya v. Fisher*, 189 U.S. 86 (1903); see also *Chin Yow v. United States*, 208 U.S. 8 (1908).

the board of supervisors of the city to grant or withhold licenses for the operation of laundries in wooden buildings. The board granted such licenses to eighty Caucasian laundries and denied them to 200 Chinese who had been operating laundries in wooden buildings for twenty years. All Chinese applications were rejected and all but one Caucasian application were approved.<sup>242</sup> The Chinese petitioners challenged the *application* of the ordinance as a violation of the Fourteenth Amendment equal protection clause.

Justice Matthews, writing for a unanimous Court (including Harlan), held the ordinances unconstitutional on the ground that they:

seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. . . . It is purely arbitrary, and acknowledges neither guidance nor restraint.<sup>243</sup>

Quoting from *Soon Hing*,<sup>244</sup> Matthews held that "all persons engaged in the same business [must be] treated alike, and subject[ed] to the same restrictions, and [are] entitled to the same privileges, under similar conditions."<sup>245</sup>

In considering the applicability of the Fourteenth Amendment to the Chinese, Matthews noted that "[t]he fourteenth amendment to the constitution is not confined to the protection of citizens." It forbids any state from denying "any person within its jurisdiction the equal protection of the laws."<sup>246</sup> Matthews observed that "[t]hese provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."<sup>247</sup>

Then, Matthews made a crucial connection between the treatment

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242. *Yick Wo*, 118 U.S. at 359. Circuit Judge Sawyer's powerful opinion in *In re Wo Lee*, 26 F. 471 (1886), a related case to *Yick Wo*, cast the case in a very favorable posture. Judge Sawyer demonstrated that the only possible purpose of the ordinance was to drive Chinese laundrymen out of business and showed how systematic the licensing officials had been in discriminating against Chinese laundrymen. Sawyer's opinion was cited and quoted extensively by the Court in *Yick Wo*. 118 U.S. at 361-63.

243. *Id.* at 366-67.

244. *Soon Hing v. Crowley*, 113 U.S. 703 (1885) (upholding an ordinance requiring that no washing or ironing be done in laundries between 10 p.m. and 6 a.m. as a valid exercise of the police power because it was applied equally to all laundries).

245. *Yick Wo*, 118 U.S. at 367.

246. *Id.* (quoting U.S. Const. amend. XIV)

247. *Id.* at 369.



of the Chinese under the San Francisco ordinances and slavery.

[T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.<sup>248</sup>

For Harlan, this would have been a powerful analogy. Once Harlan saw the attempt to subordinate the Chinese to the whim of the white board in terms of the exercise of the kind of arbitrary power that was “the essence of slavery itself” all of his responses to the tyranny of Black slavery would have been engaged. The subordination of, and discrimination against, the Chinese was on account of race (as was also true for Blacks), and was, thus, equally a violation of American republican principles.

[T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities . . . with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment . . . . Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.<sup>249</sup>

This kind of discrimination, the passage of apparently race-neutral

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248. *Id.* at 370.

249. *Id.* at 373-74. For a more complicated explanation of *Yick Wo*, see Gabriel J. Chin, *Unexplainable on the Grounds of Race: Doubts About Yick Wo*, 2008 ILL. L. REV. 1359 (2008); Thomas W. Joo, *Yick Wo Re-Visited: NonBlack Nonwhites and Fourteenth Amendment History*, 2008 ILL. L. REV. 1427 (2008); see also Thomas Wuil Joo, *New “Conspiracy Theory” of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F.L. REV. 353 (1995). This interpretation would not explain Harlan’s vote because he was largely immune to the substantive due process argument justifying the use of the Fourteenth Amendment to protect property interests against state regulation. See, for example, Harlan’s dissent in *Lochner v. New York*, 198 U.S. 45 (1905), which was overruled in part by *Ferguson v. Skrupa*, 372 U.S. 726 (1963). This should remind us, if such a reminder is necessary, that Justices may cast similar votes for very different reasons. For the traditional interpretation of *Yick Wo*, see 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* §18.8(b) (4th ed. 2007).

laws that were in practice applied discriminatorily, was exactly the course being taken in the South against Blacks. Harlan, who argued so strenuously against this system when resorted to in the South, could not have misunderstood the implications of what was happening in the West. The fact that the discrimination in *Yick Wo* affected the laundrymen's livelihood and property rights also made the case appealing on its facts to the members of the largely conservative Court.

A second case, involving the right of Chinese residents to be free from violence, *Baldwin v. Franks*,<sup>250</sup> came to the Court the next year. The case grew out of what one scholar has called "The Anti-Chinese Hysteria of 1885-1886."<sup>251</sup>

Thomas Baldwin, with several others, was charged and convicted under federal civil rights statutes for participating in a criminal conspiracy to use intimidation and violence to drive the Chinese residents of the town of Nicolaus, California, out of the county.<sup>252</sup> The defendants used force to round-up the Chinese residents of the town and herded them onto a steam barge in the Feather River, expelling them from their homes and businesses.

The Court, speaking through Chief Justice Waite, held the federal civil rights statutes under which Baldwin had been charged, did not apply to his case. In *United States v. Harris*,<sup>253</sup> the Court had already decided that section 5519 of the Revised Statutes of 1874 was

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250. 120 U.S. 678 (1887).

251. "Outbursts of violence, individual and collective, directed at the Chinese, had punctuated California history from the beginnings of the immigration . . . . The fall and winter of 1885-86, however, would prove to be a season of special ferocity." MCCLAIN, *supra* note 14, at 173.

252. The defendants were prosecuted for violating three sections of the Revised Statutes of 1874:

Section 5519 made it a federal crime for "two or more persons [to conspire or go] on the highway or on the premises of another, for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . ."

*Baldwin*, 120 U.S. at 683-84 (quoting Revised Statutes of 1874, ch. 7, § 5519, 18 Stat. 1076). Section 5508 made it a federal crime for

two or more persons [to] conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or . . . [to] go . . . on the highway, or on the premises of another, with the intent to prevent or hinder his free exercise [thereof].

*Id.* at 684 (quoting §5508, 18 Stat. 1073). Section 5336 made it a federal crime for "two or more persons . . . to conspire . . . to oppose by force the authority [of the United States], or by force to prevent, hinder, or delay the execution of any law of the United States . . . ." *Id.* (quoting § 5336, 18 Stat. 1041-42).

253. 106 U.S. 629 (1883).

unconstitutional as applied to conspiracies involving ordinary crimes committed by one citizen of the United States against another citizen within a state. In *Baldwin*, the Court rejected the argument that it could still be read to protect aliens who asserted interference with rights guaranteed under a federal treaty. The Court held that language in the section protecting aliens was also unenforceable because it was not severable from the part of the statute purporting to cover citizens.<sup>254</sup> The Court also held that sections 5508<sup>255</sup> and 5336<sup>256</sup> did not apply. Section 5508 applied only to conspiracies against citizens using the word in its political sense “and not as mere persons, residents, or inhabitants.”<sup>257</sup> The majority held that section 5336 applied only to conspiracies to use force to oppose some assertion of national authority, “[a] mere violation of law is not enough.”<sup>258</sup> While hinting that it was somewhat troubled by the effect of its restrictive construction of the statutes,<sup>259</sup> the majority was far more concerned with reading these penal statutes as narrowly as possible, rather than with protecting peaceful resident Chinese against mob violence.

In *Baldwin*, Harlan wrote an impassioned dissent in which he argued that the national government had a duty, under treaties with China, to protect the Chinese residing lawfully in the United States. He argued that sections 5508 and 5336 should be applied to fulfill those obligations. Carefully parsing section 5508, Harlan argued that even if the first clause applied only to citizens, the second clause was not so restricted. There, the subject “with which congress was dealing was the protection of ‘any right or privilege’ secured by the constitution or laws of the United States.”<sup>260</sup> Harlan continued: “In my judgment [this] case is within both the letter and spirit of the statute.”<sup>261</sup> He was unwilling to “imput[e] to congress the purpose of *withholding national protection from those who do not happen to enjoy the privileges of American citizenship, — a purpose inconsistent with the obligations which the*

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254. *Baldwin*, 120 U.S. at 685.

255. Revised Statutes of 1874, ch. 7, §5508, 18 Stat. 1067-68.

256. § 5336, 18 Stat. 1037.

257. *Baldwin*, 120 U.S. at 691.

258. *Id.* at 693. Waite concluded: “The force [in this case] was exerted in opposition to a class of persons who had the right to look to the government for protection against such wrongs, not in opposition to the government while actually engaged in an attempt to afford that protection.” *Id.*

259. Waite wrote: “It may be that by this construction of the statute some are excluded from the protection it affords who are as much entitled to it as those who are included; but that is a defect, if it exists, which can be cured by congress, but not by the courts.” *Id.* at 692.

260. *Id.* at 695 (Harlan, J., dissenting).

261. *Id.* at 696.

*nation has assumed by treaties with other countries.*"<sup>262</sup> In Harlan's view, Congress intended "to guard the homes of *all persons* against invasion by combinations of lawless men, who seek, by entering those homes, to prevent the free exercise of rights secured by the constitution or laws of the United States."<sup>263</sup>

It is possible that Harlan's default position that national power should be read broadly, and his desire to empower Congress to protect Black citizens influenced him, in this case, to read Congressional power more broadly than the majority. However, it is clear that Harlan need not have argued for extension of civil rights protections to *aliens* in order to argue for their application to Black *citizens*. In his dissent, he returned to Black civil rights to reiterate his argument in favor of a broad reading of Congress' power under the enforcement clause of the Fourteenth Amendment. Quoting from the *Civil Rights Cases*, Harlan renewed his objection to *Harris*, and then suggested:

[T]he main purpose of giving congress power to enforce, by *legislation*, the provisions of the [Fourteenth ] amendment was that the rights therein granted or guaranteed might be guarded and protected against lawless combinations of individuals, acting without the direct sanction of the state. The denial by the state of the equal protection of the laws to *persons* within its jurisdiction may arise as well from the failure or inability of the state authorities to give that protection as from unfriendly enactments.<sup>264</sup>

The larger elements of Harlan's jurisprudence do not explain his argument that section 5508 should protect aliens. In fact, this interpretation cuts against his default statutory literalism since the first section of 5508 limits its application to citizens. Rather, he appears to have responded to the image of a lawless mob attacking the law-abiding Chinese in the same way he responded to the lawless conduct of what he called "the Ku Klux" in Kentucky in the post-Civil War period, or as he responded to the lawless conduct of feral mobs engaged in similar and worse behavior toward Blacks throughout the South in these years, or as he would respond to the so-called "Night-riders" in Kentucky.<sup>265</sup> While respecting the good judgment of the common man, Harlan feared the

262. *Id.* (emphasis added).

263. *Id.* at 697 (emphasis added).

264. *Id.* at 700 (second emphasis added).

265. Hartz, *supra* note 3, at 35-36. In a private correspondence, Harlan wrote: "[t]he outstanding issue . . . must be *settled* whether we are to have a government of *law* at all, or *the rule of the mob* . . ." Letter from John Marshall Harlan to Augustus Willson (Aug. 24, 1908) (on file in the Willson Papers with The Filson Club, Louisville, Kentucky); *see also* BETH, *supra* note 3, at 81-97; YARBROUGH, *supra* note 3, at 65-85; Westin, *supra* note 3, at 659.

irrational passions of a mob. In *Baldwin*, the rule of law was at stake and, for Harlan, the rule of law was essential to civilized living and it applied to everyone subject to its authority. Human beings needed restraint and the law was there to provide that restraint when self-control and the veneer of civilization wore thin and naked violence threatened. Harlan was a serious Calvinist. As such, he believed he knew the evil potential of Fallen Man, and he cherished the law as given by God for Man's management.<sup>266</sup> Still more importantly, the parallels between the treatment of the freedmen in the South and the Chinese on the West Coast could not have escaped Harlan. His reference to the Thirteenth Amendment and its operation not only to annul state laws upholding slavery but also "to establish 'universal civil and political freedom throughout the United States,' and to invest every individual person within their jurisdiction with the right of freedom" makes clear the connections he was making. In *Baldwin*, in his dissent, Harlan put these pieces together and displayed a concern for Chinese rights as complete as his concern for the rights of the Black freedmen.<sup>267</sup>

A third case, *Wong Wing v. United States*,<sup>268</sup> implicating due process, came to the Court in 1896. In *Wong Wing*, the petitioners were arrested in the city of Detroit for being in the country illegally. They were brought before a commissioner of the federal circuit court, sentenced to hard labor, and ordered deported after completion of their

266. See Gordon, *supra* note 12, at 366-68.

267. See *Baldwin*, 120 U.S. at 695 (Harlan, J., dissenting). His dissent in *Baldwin* was so important to Harlan that, near the end of his life, he included it in a list of his opinions he wanted collected and published. See Personal Notes, John Marshall Harlan, In book containing my opinions & dissenting opinions publish the following, in HARLAN PAPERS, UL, *supra* note 1, at reel 14, frame 400-05, 404. This list of cases is set out in PRZYBYSEWSKI, *supra* note 10, at 209-11. Even Harlan's critic, Professor Maltz, has written "if only Yick Wo and Baldwin were considered, Harlan could well be characterized as a champion of the Chinese." Maltz, *Only Partially Color-Blind*, *supra* note 10, at 1008. Justice Field wrote a separate dissent in *Baldwin* in which he said he found Harlan's argument about the last clause of 5508 persuasive but Field chose to rest his objection to the majority opinion on 5536. He argued that the Burlingame Treaty with China in 1868 was self-executing and that the defendants' conspiracy to expel all Chinese, not particular Chinese, from the town and county was a conspiracy to defeat the provisions of the Treaty. Thus, the purpose of their conspiracy was "to nullify and defeat" the Treaty provisions permitting Chinese to reside in the United States.

[I]n all cases . . . where a clause of a treaty conferring rights or privileges operates by its own terms and does not require congressional legislation to give it effect, a conspiracy to prevent by force their enjoyment is a conspiracy to prevent by force the execution of a law of the United States; that is, to prevent its having, with respect to the rights and privileges stipulated, any effectual operation.

*Baldwin*, 120 U.S. at 766 (Field, J., dissenting).

268. 163 U.S. 228 (1896).

jail terms by a United States commissioner under the fourth section of the Geary Act of 1892. The petitioners argued that the provision of the Act permitting imprisonment at hard labor before deportation, which provided for neither a grand jury indictment nor trial by jury, violated the Fifth and Sixth Amendments. The government argued that the offense was not an "infamous crime" and did not require indictment or trial by jury.<sup>269</sup> Although the Court had previously held that it was within the power of Congress to order the summary deportation of Chinese persons illegally in the country, Wong Wing asked whether Congress also could order their punishment by imprisonment at hard labor without a jury trial.

Justice Shiras, writing for the Court,<sup>270</sup> observed that this question had been reserved in *Fong Yue Ting*.<sup>271</sup> In *Wong Wing*, the Court held that Congress could provide for the detention of aliens pending expulsion as a necessary incident to the power to deport them. However, the Court also held that Congress did not have the power to order punishment by imprisonment at hard labor without both a grand jury indictment and trial by jury.

When congress sees fit . . . [to subject] the persons of . . . aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.

. . . It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents.<sup>272</sup>

Quoting *Yick Wo*, the Court held that the provisions of the Fifth and Sixth Amendments

"are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, color, or nationality" . . . . [E]ven aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of grand jury, nor be deprived of life, liberty, or property

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269. *Id.* at 234-35.

270. Justice Brewer did not participate in *Wong Wing*. Justice Field concurred in part and dissented in part. Strangely, it was not from any part of the majority opinion that Field dissented. Rather, he dissented in opposition to the argument made by counsel for the government that "persons within the territorial jurisdiction of this republic might be beyond the protection of the law." *Id.* at 242-43 (Field, J., dissenting).

271. *Id.* at 237.

272. *Id.*

without due process of law.<sup>273</sup>

Harlan joined the majority in *Wong Wing* without writing an opinion. In *Wong Wing*, as in the other cases discussed in this section, the Court focused not on congressional power over immigration and deportation, (though all of the justices reiterated that Congress had plenary power over both subjects), but rather on what American Republicanism required.

The question of who should be admitted to the Republic was a political question that Harlan seems to have believed was outside the competence of the judiciary. But the question, what was required in regulating the rights of Chinese resident aliens to personal liberty and protection of property, once they were in the country, was an entirely different matter for Harlan. Every person within the territorial limits of the United States or on land subject to American sovereignty, “without regard to race or national origin,”<sup>274</sup> was entitled to the full protection of American law and of those parts of the Constitution that applied to all “persons.” Harlan’s *Yick Wo* and *Wong Wing* votes and his *Baldwin* dissent suggest that he made this distinction. His later dissents in the *Insular Cases*, insisting that this boundary existed, made his position undeniably clear.<sup>275</sup>

In cases implicating these rights, Harlan was as protective of Chinese resident aliens as of Black citizens. In both situations, if racism and equality before the law were at war, racism must give way. For Harlan, with the Union victory in the Civil War this issue had been definitively resolved and that resolution had been memorialized in the amended Constitution. If Harlan *had doubts about* whether the Chinese could be, with safety to American institutions, allowed to enter the country in large numbers, *he knew* that white racism and its corollary, subordination of those of color within the American community, posed a direct threat to American institutions. To combat this threat, he insisted that once the Chinese were resident in the country, they were entitled to all the constitutional protections applied to other “persons.” Harlan embraced this ideal more consistently than the Court upon which he served. What he came to believe and what he wrote about the need to eradicate the race line where Blacks were concerned, he seems also to have come to believe about discrimination against Asians.<sup>276</sup>

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273. *Id.* at 238.

274. *See supra* text accompanying note 40.

275. *See infra* Part IV. He had made the same point in *Lem Moon Sing v. United States*, 158 U.S. 538, 549 (1895).

276. This seems to be confirmed by a speech Harlan made at the University of

## IV. THE INSULAR CASES

A series of cases that came to the Court in the first few years of the new twentieth century offered a number of opportunities for the justices to reveal their views on race and how the people of color inhabiting the lands newly acquired from Spain at the end of the Spanish-American War should be treated under the Constitution. These cases, often labeled the *Insular Cases*, asked the same questions in a number of contexts. What was the constitutional status of these territories? Did the United States Constitution apply to them? If it did apply, did it apply in its entirety or only in some of its parts? If only some of its parts applied, which parts were they? All of these questions were boiled down, in the parlance of the day, to one: Did the Constitution follow the flag?

Harlan consistently and with great passion urged that the Constitution applied in its entirety to the inhabitants of the island territories, whatever their race, cultural setting, or state of development, from the instant the United States assumed sovereignty over them. In these views, he was joined by Justices Brewer and Peckham, the justices who were most sensitive to the rights of the Chinese, and by Chief Justice Fuller.

Two early cases, *De Lima v. Bidwell*<sup>277</sup> and *Downes v. Bidwell*,<sup>278</sup> presented the question whether the newly acquired territories were foreign or domestic, and whether the constitutional requirement that duties be uniform "throughout the United States" applied to Puerto Rico as part of the United States. Two later cases, *Hawaii v. Mankichi*<sup>279</sup> and *Dorr v. United States*,<sup>280</sup> asked whether the constitutional provisions dealing with criminal prosecutions were in effect in Hawaii from the date of annexation, and whether the Sixth Amendment right to a jury trial in criminal cases applied to the Philippines before "incorporation."

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Pennsylvania in 1900, when he spoke on "James Wilson and the Formation of the Constitution." John Marshall Harlan, *James Wilson and the Formation of the Constitution*, 34 AM. L. REV. 481 (1900). Professor Przybyszewski dismisses this speech as a "4<sup>th</sup> of July" political speech of the kind Harlan might have given during his political career. PRZYBYSZEWSKI, *supra* note 10, at 132. But I would argue it was important because it reflected Harlan's personal resolution of the problems with race with which the country was struggling in 1900. At the time, the United States was wrestling not only with the problems of Black Americans and the Chinese, but also with the new iterations of the race problem presented by the acquisition of America's first "outlying" dominions. In struggling with the various strands of the "race problem" Harlan might well have reached the kind of synthesis he described in his University of Pennsylvania speech.

277. 182 U.S. 1 (1901).

278. 182 U.S. 244 (1901).

279. 190 U.S. 197 (1903).

280. 195 U.S. 138 (1904).



In three of these four cases Harlan wrote passionate dissents arguing for immediate and full application of the Constitution to the new lands and to the newly-acquired Americans of color.

In *De Lima*, the question was whether territory ceded to the United States by a foreign power, Spain, in this case Puerto Rico, was a “foreign country” for purposes of the tariff laws. Justice Brown, writing for a majority consisting of himself, Chief Justice Fuller, and Justices Brewer, Peckham, and Harlan, held that once “foreign territory” was ceded to the United States, it ceased to be “foreign” for purposes of the tariff, but how much else was decided was unclear in a rambling and obscure opinion. Lurking behind the tariff question was a much bigger issue: What was the status of the overseas peoples who had come along with the islands? Were they Americans? If the answer was yes, what was the extent of their constitutional rights?

Gray, McKenna, Shiras, and White dissented in *De Lima*. McKenna, writing for three of the four, argued that the treaty with Spain expressly declared that “the status of the ceded territory is to be determined by Congress.”<sup>281</sup> They argued that the new overseas territories were not “incorporated” into the United States until Congress chose to do so, but rather occupied a third status between being fully foreign and fully domestic.<sup>282</sup>

The companion case, *Downes v. Bidwell*, saw Brown switch sides, supplying the dissenters in *De Lima* with the critical fifth vote to form a new majority. Brown, Gray, and White wrote separate concurring opinions. This fragmented majority held that, although no longer foreign territory, neither was Puerto Rico fully “a part of the *United States*.”<sup>283</sup> It was up to Congress to determine if and when the inhabitants of the Philippines and Puerto Rico should become citizens of the United States. In response to the fear that, if the Constitution did not apply in all its provisions to the overseas territories, Congress might exercise despotic power there, Brown wrote: “There are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests.”<sup>284</sup>

Brown justified delaying citizenship because the permanent status of the islands was not yet decided.<sup>285</sup> In the meantime,

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281. *De Lima*, 182 U.S. at 214 (McKenna, J., dissenting).

282. *Id.* at 219.

283. *Downes*, 182 U.S. at 249.

284. *Id.* at 280.

285. *Id.* at 283.

[e]ven if regarded as aliens, [their inhabitants] are entitled under the principles of the Constitution to be protected in life, liberty, and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States.<sup>286</sup>

Justice White wrote a concurrence in which Shiras and McKenna joined.<sup>287</sup> White was honest enough to acknowledge that his reservations about automatically extending the entire Constitution to the overseas territories were grounded in the race and customs of their inhabitants.<sup>288</sup> White argued that the critical question was whether the territory had been "incorporated" into the United States or not. This, he suggested, was a political decision for Congress with which the judiciary had nothing to do.

Chief Justice Fuller dissented, with the concurrence of Justices Harlan, Brewer, and Peckham. Fuller acknowledged that the United States could obtain territory "by conquest, by treaty, or by discovery and occupation" but argued that "[t]he source of national power in this country is the Constitution of the United States; and the government, as to our internal affairs, possesses no inherent sovereign power not derived from that instrument, and inconsistent with its letter and spirit."<sup>289</sup> Fuller rejected the idea that "if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period . . . ."<sup>290</sup> Fuller's objection was to the proposition that the United States could acquire and rule over distant territories "to be governed by different rules than those obtaining in the original states and territories . . . ."<sup>291</sup> He feared that accepting such a principle "substitutes for the present system of republican government a

286. *Id.* (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895); *Wong Wing v. United States*, 163 U.S. 228 (1896)).

287. *Downes*, 182 U.S. at 306 (White, J., concurring).

288. *See id.* at 282, 287 (White, J., concurring) ("It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, . . . which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians. . . . If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible . . . .").

289. *Id.* at 369 (Fuller, J., dissenting).

290. *Id.* at 372.

291. *Id.* at 373.

system of domination over distant provinces in the exercise of unrestricted power.”<sup>292</sup>

Justice Harlan joined Fuller’s dissent but also wrote separately.<sup>293</sup> Harlan feared that if the proposition that Congress could rule overseas possessions unrestrained by selected provisions of the Constitution, “[w]e will . . . pass from the era of constitutional liberty guarded and protected by a written constitution into an era of legislative absolutism.”<sup>294</sup>

Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this government may not do consistently with our fundamental law. . . . The idea that this country may acquire territories anywhere upon the earth, by conquest or by treaty, and hold them as mere colonies or provinces, — *the people inhabiting them to enjoy only such rights as Congress chooses to accord to them*, — is wholly inconsistent with the spirit and genius, as well as the words, of the Constitution.<sup>295</sup>

The echo of *Dred Scott* is unmistakable. For Harlan, the legal subordination of other races violated fundamental constitutional principles. Harlan rejected Brown’s suggestion that other races could rely on “Anglo-Saxon character” to protect them. In rebuttal, Harlan observed that “[t]he wise men who framed the Constitution, and the patriotic people who adopted it, [had] proceeded on the theory . . . that the only safe guaranty against governmental oppression was to withhold or restrict the power to oppress.”<sup>296</sup> Then, turning to the suggestion that it might be necessary for the United States to rule over places “inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought,” not capable of “the administration of government and justice, according to Anglo-Saxon principles,” Harlan insisted:

Whether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty. A mistake in the acquisition of territory . . . cannot be made the ground for violating the Constitution . . . . The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of

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292. *Id.*

293. *Id.* at 375 (Harlan, J., dissenting).

294. *Id.* at 379.

295. *Id.* at 380 (emphasis added).

296. *Id.* at 381.

the United States . . . .<sup>297</sup>

When forced to choose between the legal subordination of other races and constitutional republicanism, Harlan chose republicanism. For Harlan, the overseas territories were now part of the United States and their inhabitants had become Americans. Race did not determine who could or could not be an American and it could not justify subordination.

Harlan's observations in *Downes v. Bidwell* are reminiscent of those of Justice Brewer in the latter's dissent in *Fong Yue Ting*. The asserted power of Congress to provide for the banishment of the Chinese who failed to obtain the necessary certificate of residence in *Fong Yue Ting* was grounded in "inherent sovereignty" as was the majority position in *Downes*. In Brewer's dissent in *Fong Yue Ting*, he argued that:

This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? . . . The governments of other nations have elastic powers. Ours are fixed and bounded by a written constitution.<sup>298</sup>

Harlan could have included these words in his *Downes* dissent.

In *Fong Yue Ting*, Brewer argued for a distinction between aliens seeking entry into the United States from outside and alien residents who, already present in the United States were subjected, in *Fong Yue Ting*, to summary expulsion.

[I]t may be that the national government, having full control of all matters relating to other nations, has the power to build, as it were, a Chinese wall around our borders, and absolutely forbid aliens to enter. But the constitution has potency everywhere within the limits of our territory, and the powers which the national government may exercise within such limits are those, and only those, given to it by that instrument.<sup>299</sup>

In the Chinese cases, Brewer argued that power over aliens resident in the United States was still limited by other constitutional restrictions on the exercise of national power. The Fifth Amendment requirement of due process and the rest of the Bill of Rights applied as limitations.

297. *Id.* at 384-85 (citations omitted).

298. *Fong Yue Ting v. United States*, 149 U.S. 698, 737 (1893) (Brewer, J., dissenting).

299. *Id.* at 738. Chief Justice Fuller had joined in this part of Brewer's dissent in *Fong Yue Ting*. Justice Peckham did not join the Court until 1895, but he was usually aligned with Justice Brewer in the Chinese cases on which he sat, and of course, Harlan did not participate in *Fong Yue Ting* but may well have agreed with Brewer if he had. Thus, the alignment in the *Insular Cases* resembles the alignment of the dissenters in *Fong Yue Ting*, with the addition of Harlan.

Brewer noted that in many of these provisions “the word ‘citizen’ is not found.”<sup>300</sup> In the Fifth Amendment, the word used was “person.” Citing *Yick Wo*,<sup>301</sup> which Harlan had joined, Brewer continued: “These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . .”<sup>302</sup> By siding, so emphatically, with Brewer and Fuller in *Downes*, Harlan implicitly rejected the most controversial parts of Justice Gray’s majority opinion in *Fong Yue Ting*.

Harlan repeated his position two years later when he wrote, again in dissent, in *Hawaii v. Mankichi*.<sup>303</sup> Mankichi was charged with murder without a grand jury indictment under Hawaii’s criminal justice system, as it existed before Hawaii was annexed by the United States. He was then convicted of manslaughter by a petit jury that divided nine to three. The charge and conviction occurred between the time Hawaii was annexed to the United States in 1898, and the time that Congress enacted, in 1900, a comprehensive act organizing the territory. Among other things, the 1900 act changed the Hawaiian criminal justice system to bring it into compliance with the requirements of the Fifth and Sixth Amendments, as then understood, by requiring a grand jury indictment to initiate a charge for “a capital or otherwise infamous crime” and by requiring that a guilty verdict in a criminal case must be unanimous. After conviction, Mankichi sought release by habeas corpus. It was granted by the United States district court. On appeal to the United States Supreme Court, a fractured Court reversed.

Justice Brown, again writing for the Court, held that Hawaii was not incorporated into the United States until the Territorial Organization Act of 1900. He held further that the language of the congressional joint resolution, annexing Hawaii in 1898, did not indicate that Congress had intended to change Hawaiian criminal procedure before 1900.<sup>304</sup>

Chief Justice Fuller dissented, as he had done in *Downes*, again with the concurrence of Justices Harlan, Brewer, and Peckham. Fuller rejected the majority’s view that a grand jury indictment and the requirement of a unanimous petit jury verdict were procedural rather than fundamental rights. Both requirements, Fuller argued, were imposed as soon as the American flag rose over Hawaii.

While joining Fuller’s dissent, Harlan also again wrote separately.

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300. *Id.* at 739.

301. 118 U.S. 356 (1886).

302. *Fong Yue Ting*, 149 U.S. at 739 (Brewer, J., dissenting).

303. 190 U.S. 197 (1903).

304. *Id.* at 211.

He repeated his objection to the proposition that Congress could "withhold fundamental guarantees of life and liberty from peoples who have come under our complete jurisdiction; who . . . have become our fellow-countrymen; and over whose country we have acquired the authority to exercise sovereign dominion. In my judgment," he continued,

neither the life nor the liberty nor the property of any person, within any of the territory or country over which the United States is sovereign, can be taken, under the sanction of any civil tribunal acting under its authority, by any form of procedure inconsistent with the Constitution of the United States.<sup>305</sup>

This was consistent with the position he had taken in *Yick Wo, Baldwin, Wong Wing*, and in *Wong Kim Ark*. It is also consistent with Justice Brewer's dissent in *Fong Yue Ting*.

Harlan explicitly rejected the idea that "constitutional provisions designed for the protection of life and liberty may be claimed by some of the people subject to the authority and jurisdiction of the United States, but cannot be claimed by others equally subject to its authority and jurisdiction."<sup>306</sup> He then argued:

[I]f the principles now announced should become firmly established, the time may not be far distant when, . . . to gratify an ambition to become the dominant political power in all the earth, the United States will acquire territories in every direction, which are inhabited by human beings, over which territories, to be called 'dependencies' or 'outlying possessions,' we will exercise absolute dominion, and whose inhabitants will be regarded as 'subjects' or 'dependent peoples,' to be controlled as Congress may see fit, not as the Constitution requires nor as the people governed may wish. Thus will be engrafted upon our republican institutions . . . a colonial system entirely foreign to the genius of our government and abhorrent to the principles that underlie and pervade the Constitution.<sup>307</sup>

Finally, Harlan objected to the majority's conception of statutory interpretation and its construction of the joint resolution in *Mankichi*.

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305. *Id.* at 236 (Harlan, J., dissenting). Harlan maintained this position even after the others who had joined in Fuller's dissent had given up. *See* *Dorr v. United States*, 195 U.S. 138 (1904) (Harlan, J., dissenting); *Rasmussen v. United States*, 197 U.S. 516 (1905) (Harlan, J., concurring); *see also* *Dowdell v. United States*, 221 U.S. 325 (1907) (Harlan, J., dissenting) (without opinion).

306. *Mankichi*, 190 U.S. at 239 (Harlan, J., dissenting).

307. *Id.* at 240.

Asserting his view that the courts were constrained by the letter of the statute, he concluded: "We must interpret the law as it is written. . . . [W]hen the meaning of the statute is plain, there is no room for interpretation. The consequences are for the lawmaking power."<sup>308</sup>

These words not only illustrate Harlan's characteristic textual literalism, they might also serve as an answer to his critics in the Chinese immigration cases. In those cases, it was deference to Congress rather than anti-Chinese animus that drove Harlan's decisions. Blame for the harms the Exclusion regime did to individual petitioners belongs to Congress, not to the Court.

In *Dorr v. United States*,<sup>309</sup> a prosecution for criminal libel under Spanish law before "incorporation" of the Philippines, the question was whether the inhabitants of the Philippines had a right to jury trial. Justice Day, writing for the majority argued that the right to trial by jury could not be extended to "the uncivilized parts of the archipelago," to people who were "wholly unfitted to exercise the right."<sup>310</sup> In response, Harlan insisted the majority in *Dorr* had rewritten the jury trial provision of the Sixth Amendment so that it now read: "'The trial of all crimes, except in cases of impeachment, and except where Filipinos are concerned, shall be by jury.'"<sup>311</sup> Such gross reworking of the text, he fumed, "plays havoc with the old-fashioned ideas of the fathers . . ."<sup>312</sup> He closed by quoting his own dissent in *Mankichi*:

'neither the life, nor the liberty, nor the property of *any* person, within any territory or country over which the United States is sovereign, can be taken, under the sanction of any civil tribunal, acting under its authority, by any form of procedure inconsistent with the Constitution of the United States.'<sup>313</sup>

These dissents make it clear that Harlan's views transcended race. Overseas expansion created a tension for Harlan. His nativist inclinations pressed him to defend the Constitution and keep American

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308. *Id.* at 247-48.

309. 195 U.S. 138 (1904).

310. *Id.* at 145.

311. *Id.* at 156 (Harlan, J., dissenting) (quoting the majority opinion but adding the emphasized words to clarify his view of the majority's holding).

312. *Id.* For an extensive discussion of Harlan's views on the importance of the grand jury and petit jury system, see *Hurtado v. California*, 110 U.S. 516, 538-58 (1884) (Harlan, J., dissenting) and *Maxwell v. Dow*, 176 U.S. 581, 605 (1900) (Harlan, J., dissenting). Harlan included his *Mankichi* and *Dorr* dissents, (as well as *Hurtado* and *Maxwell*), in the list of twenty-four dissents he wanted published which he compiled near the end of his life. PRZYBYZSEWSKI, *supra* note 10, at 2010-11.

313. *Dorr*, 195 U.S. at 157 (Harlan, J., dissenting) (citation omitted).

institutions "distinctly under the control of Americans." But he understood that there was another threat to those institutions and the Constitution he cherished. If the United States exercised sovereignty over the inhabitants of color of "dependencies" either it must extend the authority of the Constitution to those places and those peoples, or it must betray its most fundamental republican principles and the Constitution itself in order to subordinate them.<sup>314</sup> To Harlan's credit, when he recognized the choice he faced, he consistently argued for republicanism and the application of the Constitution to everyone over whom the United States ruled. This meant that the "color-blind" Constitution he had advocated in *Plessy* had to apply everywhere and the argument that distinctions could be justified on the basis of race or cultural inferiority must be rejected.

But were the inhabitants of the island territories citizens?<sup>315</sup> In his dissent in *Downes*, which Harlan joined, Fuller stated that "the subjects of the former sovereign are brought by the transfer under the protection of the acquiring power, and are so far forth impressed with its nationality, but it does not follow that they necessarily acquire the full status of citizens."<sup>316</sup>

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314. Harlan made this point in a letter to Chief Justice Fuller.

The more I think of these questions, the more alarmed I am at the effect upon our institutions of the doctrine that this country may acquire territory inhabited by human beings anywhere upon the [E]arth, and govern it as the will of Congress, and without regard to the restrictions imposed by the Constitution upon governmental authority.

Letter from John Marshall Harlan to Melville Weston Fuller (July 8, 1901), *quoted in* BETH, *supra* note 3, at 253.

315. Congress obviously did not think so. Its continuing anti-Chinese prejudice found expression in the joint resolution annexing Hawaii. It included language forbidding future Chinese immigration to Hawaii and provided that "except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian islands." *Hawaii v. Mankichi*, 190 U.S. 197, 229 (1903). Professor Beth, quoting from Harlan's correspondence with William Howard Taft, who served as Governor General of the Philippines, writes that "Harlan . . . strongly intimated that he felt that residents of [the] possessions ought to have all the rights of citizens . . ." BETH, *supra* note 3, at 250. Beth concluded that for Harlan "there was no constitutional logic to a differentiation between the rights of citizens of Utah territory and those of the Philippines." *Id.* at 256. I am not sure that the Taft correspondence justifies these assertions, but it certainly indicates that Taft (who thought the islands unready for trial by jury and other niceties required by the Constitution) and Harlan had very different perspectives on these questions. Professor Yarbrough also suggests that Harlan "champion[ed] . . . full citizenship for the 'alien races' of the noncontiguous territories . . ." YARBROUGH, *supra* note 3, at 200. I am not sure this is correct as to the political rights attached to citizenship.

316. *Downes*, 182 U.S. 244, 369 (1901) (Fuller, C.J., dissenting).



Three years later, in *Gonzales v. Williams*,<sup>317</sup> the Court could have answered the question whether the inhabitants of Puerto Rico at the time of cession to the United States became citizens of the United States but chose not to do so. Instead, Chief Justice Fuller, writing for a unanimous Court, held that citizens of Puerto Rico were not “aliens” but refused to answer the question whether they were citizens. It seems likely the Court ducked the question because it was divided on the issue, although it is possible the justices merely chose to decide the case on the narrower ground presented by the holding in *De Lima*.

If the Court was divided, where did Harlan stand on the political rights of citizenship? His obvious discomfort with the idea that the United States would “rule over” subject peoples and the determination he consistently displayed to treat overseas acquisitions like the territories on the North American continent, hint that he supported citizenship. But, while noting that American citizens present in the Philippines would not be entitled to a jury trial if charged there, he grounded his dissents in *Mankichi* and *Dorr* on the application of the Sixth Amendment to all “persons” not just to citizens. His reference in his 1883 letter to his son James suggesting that we must eventually admit the Chinese who came here to citizenship, including the right to vote, suggests he was prepared to accept Chinese, Puerto Ricans, or Filipinos, for American citizenship.<sup>318</sup> In *Dorr*, Justice Day, quoting Chief Justice John Marshall, had written whatever the status of inhabitants of the territories, “they do not share in the government” until they achieve statehood. In the meantime, United States citizens or not, they had only such share in the governance of the territory as Congress chose to grant them.<sup>319</sup> Harlan did not challenge this statement. Citizenship would not guarantee political participation, at least, not while the territory remained

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317. *Gonzales v. Williams*, 192 U.S. 1 (1904). In *Gonzales*, a woman resident of Puerto Rico at the time of its cession to the United States, attempted to enter the United States through the port of New York. Immigration officials refused her entry as an “alien immigrant” who was “likely to become a public charge.” *Id.* at 7. If she was an “alien immigrant,” by statute, the decision of the immigration officials was not subject to review by the courts. The Court held that, as a citizen of Puerto Rico, she was not an alien, was entitled to free access to the United States, and that the limitation on judicial review of the immigration official’s decision did not apply. The Court refused to decide, though asked, whether “the cession of Porto Rico accomplished the naturalization of its people;” or whether “a citizen of Porto Rico, under the act of 1900, is necessarily a citizen of the United States.” *Id.* at 12.

318. This assumes that Harlan’s vote in *Wong Kim Ark* against Chinese citizenship by birth did not reflect hostility to the idea of Chinese citizenship, in general, but only disagreement over the meaning of the language of the citizenship clause. See *supra* Part III.C.

319. *Dorr v. United States*, 195 U.S. 138, 142 (1904) (quoting Marshall, J., in *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1828)).

a territory and the citizen remained resident there, but it would bring other important rights including the right to relocate to a state.

Finally, one might ask whether Harlan held all along the views he expressed in the *Insular Cases*, or whether he came to them only as those cases were presented for decision.<sup>320</sup> His close friendship with Justice Brewer might have provided the stimulus for change if it occurred. However and whenever it happened, Harlan came to see racism and its insistence on the dominion of whites over people of color as the enemy of America's republican institutions. If his journey toward that understanding began with a defense of the full citizenship of Black Americans, he also seems to have come to understand that the subordination of Asians or Puerto Ricans or Filipinos implicated the same issues. This realization led him to his impassioned dissents in *Downes*, *Mankichi*, and *Dorr*.

#### CONCLUSION

The first John Marshall Harlan was not a prophet; he was a human being. But he was a human being who made a remarkable journey for a man of his time. Born into a prominent slave-holding family in a slave-holding state he became, after the Civil War abolished slavery, a champion of Black civil rights.<sup>321</sup> While acknowledging this fact, some scholars have argued that Harlan's egalitarianism had limits. They have suggested that those limits are clearly displayed in the cases involving the rights of the Chinese that came to the Court upon which he sat.

It is possible that Harlan filled-in the gaps in his knowledge about the Chinese by drawing on his nativist inclinations, informed by Justice Field's "facts" about the Chinese or by Harlan's own superficial knowledge of the larger public debate about Chinese immigration. The evidence can be used to support this version of Harlan's story. There is an aside in Harlan's *Plessy* dissent; there is a letter, which may have

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320. Eric Schepard, after accepting the revisionists' characterization of Harlan's position in the Chinese cases, argues that the *Insular* dissents show that Harlan changed his mind during the Spanish-American War, and extended his vision of a "color-blind" Constitution to the mixed races of the Philippines, Puerto Rico, and Hawaii. See Schepard, *supra* note 173. In contrast, I argue that Harlan's position in the Chinese cases may have been inaccurately characterized by the revisionists as the product of anti-Chinese racism. Thus, I suggest that Harlan did not change, but rather persevered in his views about race and the Constitution. Whenever race prejudice and the insistence on the inferiority of nonwhite peoples threatened American republican institutions, Harlan argued in favor of constitutional republicanism and against race-consciousness in the law.

321. *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting); *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting); *Berea College v. Kentucky*, 211 U.S. 45, 58 (1908) (Harlan, J., dissenting).

embodied his views or may have merely suggested arguments to be used in a college debate. There are many cases in which Harlan voted but did not write. There are a few in which he wrote opinions. Depending on how his silences and his words are understood, they can be made to implicate or to vindicate him.

Harlan joined a unanimous Court in holding that Congress possessed plenary power over the subject of immigration and in deferring to the political choices of the political branches in deciding who should and who should not be admitted to the country,<sup>322</sup> but he did not participate in the infamous *Fong Yue Ting* decision. He accepted Congress' decision to vest application of the Chinese Exclusion regime in administrative officials and to make their findings of fact conclusive and unreviewable by the courts.<sup>323</sup> Harlan's deference in the cases was grounded in his broad principles: his support for a broad reading of national power, his literalist reading of statutes and the Constitution, and on his commitment to allow matters committed by the Constitution to the political branches to be resolved there without judicial interference. Many of his votes in later cases involving immigration were *pro forma* applications of earlier cases and involved application of the principle of *stare decisis*. Even in the face of *stare decisis*, his opinion in *Yamataya v. Fisher*<sup>324</sup> and his vote in *Chin Yow v. United States*<sup>325</sup> reveal a growing concern about the behavior of immigration officials and the unfairness of the proceedings over which they presided, and suggest that he felt the need for judicial oversight in at least some extreme cases.

There were other Chinese cases besides those involving immigration. He insisted that treaty rights be taken seriously in *Chew Heong* and, while recognizing that Congress could abrogate a treaty if it intended to do so, he insisted that intent must be clearly expressed.<sup>326</sup> In other cases, Harlan favored protecting the Chinese, resident in the United States, from discriminatory laws, the discriminatory application of laws,<sup>327</sup> and from violence directed at them by their white neighbors.<sup>328</sup> Though sometimes distinguishing between the rights of "citizens" and other "persons," he argued that many constitutional protections extended not only to citizens, but to all persons within the jurisdiction of the

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322. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

323. *See Ju Toy v. United States*, 198 U.S. 253 (1905); *United States v. Lee Yen Tai*, 185 U.S. 213 (1902); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892).

324. 189 U.S. 86 (1903).

325. 208 U.S. 8 (1908).

326. *Chew Heong v. United States*, 112 U.S. 536 (1884).

327. *See Yick Wo v Hopkins*, 118 U.S. 356 (1886).

328. *See Baldwin v. Franks*, 120 U.S. 678 (1887) (Harlan, J., dissenting).

United States, including the Chinese.<sup>329</sup>

Harlan's votes and opinions in all of these cases can be explained without reference to racial animus. Much depends, as is so often the case, on the eye of the beholder. His critics have made artful use of the evidence in the story they tell about Harlan, but they have ignored features of the story, which make it more complex than they would have us believe and task him for failing to apply the modern understanding of due process and equal protection before they were invented.

There is another way to tell the story about Harlan and the Chinese. This version begins with Harlan's baseline as a champion of civil rights for Black Americans. It continues with his passionate and persevering opposition to subordination based on race, and includes his votes in defense of the rights of the Chinese once in the United States to life, liberty, and property, in *Yick Wo v. Hopkins*,<sup>330</sup> *Wong Wing v. United States*,<sup>331</sup> and in his dissent in *Baldwin v. Franks*.<sup>332</sup> It continues with his warning to immigration officials in *Yamataya v. Fisher*,<sup>333</sup> and his vote in *Chin Yow v. United States*,<sup>334</sup> and ends with his ringing dissents in *Downes v. Bidwell*,<sup>335</sup> *Hawaii v. Mankichi*,<sup>336</sup> and *Dorr v. United States*,<sup>337</sup> insisting that there is one Constitution for everyone subject to American sovereignty, and that it must be applied equally to all without regard to race.

It is possible that Harlan wanted to keep the Chinese out of the United States, as he wanted to keep out other "strangers" whose "foreignness" he believed might undermine America's political culture. But there is little to indicate that this opposition, if it existed, was grounded in particularized race prejudice. Harlan clearly believed that once inside the United States, or under its sovereign control (in the case of overseas possessions), nonwhites were entitled to the same constitutional guarantees of life, liberty, and property, as were provided to white Americans. Harlan's nativism is a flaw, but it does not prove he was a racist.

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329. See *Yick Wo*, 118 U.S. 356; *Dorr v. United States*, 195 U.S. 138, 154 (1904) (Harlan, J., dissenting); *Hawaii v. Mankichi*, 190 U.S. 197, 226 (1903) (Harlan, J., dissenting); *Downes v. Bidwell*, 182 U.S. 244, 375 (1901) (Harlan, J., dissenting).

330. 118 U.S. 356.

331. 163 U.S. 228 (1896).

332. 120 U.S. at 694 (Harlan, J., dissenting).

333. 189 U.S. 86 (1903).

334. 208 U.S. 8 (1908).

335. 182 U.S. at 375 (Harlan, J., dissenting).

336. 190 U.S. 197, 226 (1903) (Harlan, J., dissenting).

337. 195 U.S. 138, 154 (1904) (Harlan, J., dissenting).

It seems clear that, whether he arrived at the conclusions he expressed in the *Insular Cases* early or late, he was convinced that the demands of those determined to maintain white supremacy could only be satisfied by surrendering the republican principles, which Harlan believed were essential to American distinctiveness. It was not *who* Americans were that thrilled Harlan but rather *what* they stood for. When forced to choose between racial subordination and the preservation of the founding documents, Harlan chose republicanism and the ideals.

John Marshall Harlan was a human being and, as such, imperfect. But he was also admirable in his dedication to the principles the United States preaches but has not always realized in practice. The late Nineteenth and early Twentieth Centuries were a very dark time for Black Americans, Native Americans, and the Chinese in this country because of race prejudice. There is no escaping the reality of America's historical sins. What the United States is and what its principles should make it, have been too often incongruent. But just as we must acknowledge what is dark in the American past, so should we celebrate the light. Even with his flaws, Harlan was one source of that light.